BANKRUPTCY RELATED DECISIONS
U.S. BANKRUPTCY COURT, DISTRICT OF NORTH DAKOTA
U.S. DISTRICT COURT, DISTRICT OF NORTH DAKOTA
EIGHTH CIRCUIT BANKRUPTCY APPELLATE PANEL
EIGHTH CIRCUIT COURT OF APPEALS & U.S. SUPREME COURT
Prepared by Judge William A. Hill
United States Bankruptcy Court
February 13, 1997 through May 23, 2001

ABANDONMENT

In re Nelson, 251 B.R. 857 (B.A.P. 8th Cir. 2000)

> Pursuant to section 554(b), it was appropriate to direct trustee to abandon fully secured farmland having inconsequential value. The possibility of rental income during redemption period was unduly speculative.

ADMINISTRATIVE EXPENSES

In re Hen House Interstate, Inc., 150 F.3d 868 (8th Cir. 1998)
reversed *en banc* 177 F.3 719 (8th Cir. 1999)

> Generally, administrative expenses may not be charged against collateral unless the expense directly benefited the creditor. In this case the court held that a workers compensation insurer could surcharge a secured creditor's collateral despite an agreement to prohibit such payments from collateral. Following Boatmen's Bank, 5 F.3d 1157 (8th Cir. 1993), the court said that a secured party's collateral may be surcharged where the secured party directly or impliedly consents to the expense.

In re Raymond Cossette Trucking, Inc., 231 B.R. 80 (Bankr. D.N.D. 1999)

> The provisions of § 365 relating to rejection and breach are irrelevant to administrative claims made under § 503(b)(1)(A). A claim for administrative expenses is an independent remedy available where property continues to be used by the debtor resulting in value to the estate. That value is gauged against an "objective worth" standard.

In re Wedemeier, 239 B.R. 794 (B.A.P. 8th Cir. 1999)

> The value of an administrative claim for rents in farmland cannot be determined without consideration of the value for the growing season as opposed to the non-growing season. In this respect, farmland differs from standard nonresidential

commercial property.

In re Williams, 246 B.R. 591 (B.A.P. 8th Cir 1999)

Here the court determines that postpetition mortgage accruals are not entitled to administsrative expense status as the prepetition lender is not providing a "benefit to the estate." Rather, the debtor is simply continuing to use property he already owns. The lender's proper remedy was to seek relief from stay or adequate protection.

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A. (*In re Hen House Interstate, Inc.*) _ U.S. __, 2000 WL 684180 (2000)

Affirming the Eighth Circuit's en banc decision (177 F.3d 719), the Supreme Court holds that § 506(c) does not provide an administsrative claimant with an independent right to seek treatment as an administrative claimant. Only the trustee has standing. The court again announces its strict construction policy.

In re Wedemeier, 237 F.3d 938 (8th Cir. 2001)

Affirming the BAP (239 B.R. 794), the Circuit held that in valuing a landlords administrative claim for rent, the calculation must consider the true economic value for the period occupied by apportioning the rent between the growing season and non-growing season.

APPEALS

In re Popkin & Stern, 105 F.3d 1248 (8th Cir. 1997)

Statute governing bankruptcy appeals did not grant Appellate Court jurisdiction to hear appeal from district court's dismissal of interlocutory appeal from bankruptcy court order that denied motion for jury trial. The court cautioned litigants to examine jurisdictional basis for appeal before appealing.

In re Moix-McNutt, 212 B.R. 953 (B.A.P. 8th Cir. 1997)

Order sustaining objections to confirmation of debtor's proposed Chapter 13 plan was not final order from which appeal would lie.

In re Henry Bros. Partnership, 214 B.R. 192 (B.A.P. 8th Cir. 1997)

Exceptional circumstances doctrine did not apply to extend time for filing notice

of appeal from order confirming proposed Chapter 12 plan.

In re Food Barn Stores, Inc., 214 B.R. 197 (B.A.P. 8th Cir. 1997)

Counsel's alleged mistake in calculating time for appeal under federal civil procedure rules, rather than bankruptcy rules, did not demonstrate excusable neglect for creditor's failure to file timely notice of appeal.

In re Luedtke, 215 B.R. 390 (B.A.P. 8th Cir. 1997)

Bankruptcy Appellate Panel lacked subject matter jurisdiction over debtor's appeal, given untimely notice of appeal.

In re Land, 215 B.R. 398 (B.A.P. 8th Cir. 1997)

Bankruptcy Appellate Panel had jurisdiction to hear creditors' appeal from denial of motion to change venue.

In re Prasil, 215 B.R. 582 (B.A.P. 8th Cir. 1998)

The failure to obtain a stay pending appeal of an order approving the sale of estate property renders the appeal moot under §363(m). Once a sale has occurred effective relief cannot be granted.

In re West Pointe Ltd. Partnership, 215 B.R. 865 (B.A.P. 8th Cir. 1998)

Bankruptcy Appellate Panel lacked subject matter jurisdiction to hear appeal from bankruptcy court order issued after district court remanded case for further findings but retained jurisdiction.

In re Raymon, 216 B.R. 626 (B.A.P. 8th Cir. 1998)

An untimely request for extension of time to file a notice of appeal does not itself extend the appeal period absent excusable neglect.

In re Inman, 218 B.R. 458 (B.A.P. 8th Cir. 1998)

In forma pauperis status is unavailable if the trial court certifies that the appeal is not taken in good faith. In the face of such a finding, it is for the applicant to demonstrate objective good faith in the appeal.

In re Yukon Energy Corp., 138 F.3d 1254 (8th Cir. 1998)

Finality for bankruptcy purposes is a complex subject but generally, a more liberal standard is applied due to the peculiar needs of the bankruptcy process.

In re Barger, 219 B.R. 238 (B.A.P. 8th Cir. 1998)

Motion to vacate filed by Chapter 12 debtors, after denial of prior motion to alter plan confirmation order, did not preserve for appeal merits of confirmation order.

In re Kasden, 141 F.3d 1288 (8th Cir. 1998)

Bankruptcy Appellate Panel order remanding issue of who owned personal property that trustee removed from real property sold to third party was not final, appealable order.

In re Drevlow, 221 B.R. 767 (B.A.P. 8th Cir. 1998)

Bankruptcy appeal had to be dismissed for lack of timely notice of appeal, despite appellant's payment of filing fee within prescribed time period.

In re Perry, 223 B.R. 167 (B.A.P. 8th Cir. 1998)

Debtor whose appeal was taken in bad faith would be denied in forma pauperis status and appointment of counsel.

In re Ross, 223 B.R. 702 (B.A.P. 8th Cir. 1998)

Debtors' bald assertions were insufficient to prove bias on part of bankruptcy judge.

In re Popkin & Stern, 226 B.R. 881 (B.A.P. 8th Cir. 1998)

Interlocutory orders are not appealable unless exceptional circumstances exist. An order granting a motion to intervene is not a final order and thus, absent exceptional circumstances, not reviewable on appeal.

In re Weihs, 229 B.R. 187 (B.A.P. 8th Cir. 1999)

District court implicitly retained jurisdiction over previously remanded dischargeability proceeding.

In re Popkin & Stern, 234 B.R. 724 (B.A.P. 8th Cir. 1999)

> An appeal is generally rendered moot where a stay was not obtained and the property at issue has been transferred to a good faith third party purchaser.

In re Rush, 237 B.R. 473 (B.A.P. 8th Cir. 1999)

> Lack of transcript required affirmance of fact-based nondischargeability determination.

In re Simpson, 240 B.R. 559 (B.A.P. 8th Cir. 1999)

> Appeal of an order denying relief from stay was rendered moot by effect of intervening order confirming a Chapter 13 plan which provided treatment of underlying mortgage arrearage.

In re Usery, 242 B.R. 450 (B.A.P. 8th Cir. 1999)

> Here the court discusses the "mandate rule" and how it is given effect to issues decided on remand.

In re Dwyer, 244 B.R. 426 (B.A.P. 8th Cir. 2000)

> A partial disposition of an adversary proceeding is not a "final order" for purposes of appeal. In this case the court discusses the concept of final orders.

In re Hervey, 252 B.R. 763 (B.A.P. 8th Cir. 2000)

> In this case the court, in the context of a motion to strike, discusses what exhibits and issues are reviewable on appeal and reiterates that neither issues nor documents presented for the first time on appeal will be considered.

In re Green, 252 B.R. 769 (B.A.P. 8th Cir. 2000)

> Here the court applies the well settled rule that issues raised for first time on appeal will not be considered and cannot serve as a basis for reversal.

In re Little, 253 B.R. 427 (B.A.P. 8th Cir. 2000)

> An appeal becomes moot if it is impossible to grant effective relief or if there is no ongoing controversy. In this case a Chapter 7 trustee's motion to reconvert a Chapter 13 case back to Chapter 7 case was too late as no stay was in place, a plan

had been confirmed, and the Chapter 13 trustee had undertaken distribution pursuant to the plan.

In re Van Houweling, 258 B.R. 173 (B.A.P. 8th Cir. 2001)

The time for filing an appeal may be extended upon a showing of excusable neglect but the motion must be made within 30 days of the expiration of the appeal period. "Excusable Neglect" means good faith and some reasonable basis for non-compliance with the rules (citing *Pioneer Inv. Services Co. v. Brunswick Assocs.*, 507 U.S. 380 (1993).

ATTORNEY FEES

In re Schriock Const., Inc., 210 B.R. 348 (Bankr. D.N.D. 1997)

Time spent by oversecured creditor's attorneys to protect creditor's security interest in depreciating asset was not unreasonable for fee allowance purposes.

In re Ceresota Mill Ltd. Partnership, 211 B.R. 315 (B.A.P. 8th Cir. 1997)

An objection to attorney fees is subject to Rule 6006(b) and in seeking an enlargement of time, objector must show their neglect and that of counsel was excusable.

In re Schriock, 104 F.3d 200 (8th Cir. 1997)
Reversing 176 B.R. 176 (Bankr. D.N.D. 1994)

Where security agreement provided for reimbursement of attorneys fees, oversecured creditor was entitled to attorneys fees under § 506(b) despite state statute invalidating fee provisions in security agreements.

In re Kula, 213 B.R. 729 (B.A.P. 8th Cir. 1997)

In making professional fee awards, courts must either make an express lodestar calculation or make a finding that the lodestar method is inappropriate under the circumstances. The fee as thus calculated, is presumed reasonable but some adjustments may be made in the exceptional case unless the factors are already reflected in the lodestar.

In re Pfleghaar, 215 B.R. 394 (B.A.P. 8th Cir. 1997)

Attorney for Chapter 13 debtor was entitled to hearing before bankruptcy court denied his fee application.

In re Mahendra, 131 F.3d 750 (8th Cir. 1997)

Unearned portions of attorney's retainer constitute property of the estate and any pre-petition lien for services terminated by filing of the petition.

National Credit Union Admin. Bd. v. Johnson, 133 F. 3d 1097 (8th Cir. 1998)

Insolvent debtor in bankruptcy proceeding may pay a nonrefundable retainer to attorneys of his choice for representation if amount paid is reasonable and is not taken from assets that law firm either knew or should have known were secured at time they were paid and the payment was not to hide assets.

In re Sauer, 222 B.R. 604 (B.A.P. 8th Cir. 1998)

Disgorgement of fees in amount of funds advanced by Chapter 11 debtor was warranted by conduct of debtor's attorney in purchasing debtor's former residence partially with funds provided by debtor and allowing debtor to remain there.

In re Sullivan's Jewelry, Inc., 226 B.R. 624 (B.A.P. 8th Cir. 1998)

Sections 327 and 328 do not apply to professional fees generated by services performed during the involuntary gap period before an order for relief is entered. In such instances, § 329 is applicable and any fees exceeding the reasonable value of such services may be returned to the estate.

In re McKeeman, 236 B.R. 667 (B.A.P. 8th Cir. 1999)

Where a case appears to be routine a court may consider the fee request in light of fees typically charged in similar cases. Such analysis is consistent with the tests set forth in § 330 and Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974).

In re Redding, 247 B.R. 474 (B.A.P. 8th Cir. 2000)

Section 329 allows review of attorney's fees regardless of the source and the section governs all attorneys who provide pre-and post-petition services related to the bankruptcy case. It is intended to prevent overreaching. Section 330, on the other hand, addresses only the estate's obligation to pay for professional services out of estate assets.

In re Peterson, 251 B.R. 359 (B.A.P. 8th Cir. 2000)

> In ruling on attorney fee applications, it is appropriate for judges to rely upon their own knowledge of customary and reasonable fees.

In re Clark, 253 F.3d 859 (8th Cir. 2000)

> Irrespective of a plan being confirmed, court may inquire into the reasonableness of fees and attorneys may be sanctioned where a petition preparer was used and little if any legal services were provided by the attorney.

In re Kujawa, 256 B.R. 598 (B.A.P. 8th Cir. 2000)

> Affirming the bankruptcy court, the BAP concluded that $100,000 in sanctions along with attorney's fees and costs were appropriate against an attorney who orchestrated the filing of an involuntary petition against his former client.

In re Zepecki, 258 B.R. 719 (B.A.P. 8th Cir. 2001)

> In this case the court examined an attorney's fee arrangement in the context of § 329(b), discussing what fees are properly regarded as having been paid "in contemplation of bankruptcy." Courts may review compensation sua sponte and, once there is a showing that fees are excessive, a court my order disgorgement.

ATTORNEYS

Handeen v. Lamaire, 112 F.3d 1339 (8th Cir. 1997)

> Judgment creditor's allegations that bankruptcy attorneys had cooperated with judgment debtor and debtor's parents to fraudulently minimize creditor's recovery on his judgment were sufficient to state civil RICO claim against attorneys for "participating" in conduct of affairs of RICO enterprise through pattern of racketeering activity.

U.S. v. Dolan, 120 F.3d 856 (8th Cir. 1997)

> Evidence sustained conviction of debtor's attorney for conspiracy to conceal bankruptcy estate property.

In re Cochrane, 124 F.3d 978 (8th Cir. 1997)

A fiduciary relationship must arise from an express or technical trust and in general, an attorney/client relationship is the type of relationship that may give rise to a finding of "defalcation" under section 523(a)(4). "Defalcation" does not require evidence of intentional fraud or other intentional wrongdoing. It includes innocent default by a fiduciary.

Koehler v. Grant, 213 B.R. 567 (B.A.P. 8th Cir. 1997)

Chapter 11 debtor's former attorney would be held in contempt for violating disqualification order.

AVOIDABLE TRANSFERS

In re Kingsley, 208 B.R. 918 (B.A.P. 8th Cir. 1997)

A trustee may recover postpetition transfers under § 549 and recover the property or its value (relying upon *Gibson v. United States*, 927 F.2d 413 (8th Cir. 1991).

CHAPTER 11

Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership, __ U.S. __, 1999 WL257631.

In this case the Supreme Court, although not expressly deciding whether the new value corollary to the absolute priority rule remains a part of the Code, said even assuming its existence, the absolute priority rule is violated by a plan which, over the objection of impaired creditors, vested the business equity in the former partners without offering any other creditors an opportunity to compete for the equity.

In re Consumers Realty & Development Co., Inc. 238 B.R. 418 (B.A.P. 8th Cir. 1999)

The effect of plan confirmation is to replace preconfirmation debt with a new and binding contract between the debtor and creditor. The terms of the plan control the rights of the parties.

In re Danny Thomas Properties II Ltd. Partnership, 241 F.3d 959 (8th Cir. 2001)

In this case the circuit recalls the "feasibility" requirement for confirmation and concludes that a drop dead provision does not make the plan feasible as a matter of law. Although such a provision may amount to a liquidation, it would promote visionary schemes. Feasibility must be firmly rooted in predictions based on

objective fact and "drop dead" provisions will not save otherwise infeasible plans.

In re Westpointe L.P., 241 F.3d 1005 (8th Cir. 2001)

In this case the court discusses the "fair and equitable" requirement of § 1129(b) in the context of a plan which extinguishes equity interests. The requirement is concerned with interests of dissenting creditors not the debtor's interests.

CHAPTER 13

In re Bayer, 210 B.R. 794 (B.A.P. 8th Cir. 1997)

Egregious conduct, sufficient to conclude that a plan has been proposed in bad faith, must be established by evidence greater than unanswered allegations of a plan opponent.

In re Nielsen, 211 B.R. 19 (B.A.P. 8th Cir. 1997)

In making determinations as to Chapter 13 debtors' good faith and best interests of creditors, bankruptcy court was required to consider debtors' modified plan replacing original plan.

In re DeLaughter, 213 B.R. 839 (B.A.P. 8th Cir. 1997)

Rule 11 sanctions were appropriate where, following multiple Chapter 13 plan proposals, a renewed plan legally unsupportable, had been filed solely for the purpose of delaying a state court action.

In re Barcal, 213 B.R. 1008 (B.A.P. 8th Cir. 1997)

Disputed non-contingent and liquidated debts must be included in the section 109(e) Chapter 13 qualification. Eligibility for Chapter 13 relief should be premised upon the schedules, proofs of claim and any other evidence bearing upon whether the listed debts exceed section 109(e). However, the merits of the claims need not be finally determined at this time. "Contingent debts" are those in which the obligation to pay does not arise until the occurrence of a triggering event. A "liquidated debt" is one that is readily calculable or readily determinable.

In re Merrifield, 214 B.R. 362 (B.A.P. 8th Cir. 1997)

Except for a narrow exception created by § 522(h), a Chapter 13 debtor, unlike Chapter 11 and Chapter 12 debtors, does not have the authority to exercise the

trustee's avoidance powers.

In re Forbes, 215 B.R. 183 (B.A.P. 8th Cir. 1997)

The language of § 1325(a)(4) concerning the valuation date to be used in the best interest of creditors test, points to a single point in time--the "effective date of the plan" which is not altered by subsequent plan modification. The event of a post confirmation modification does not change this date.

The "best interest of creditors test" found in § 1325(b)(1) is not a factor to be considered in approving postconfirmation modifications.

In re Zaleski, 216 B.R. 425 (Bankr. D.N.D. 1997)

In the context of § 1325(a)(3) "good faith" involves a case-by-case analysis of the circumstances leading to bankruptcy and the sincerity of the debtor in proposing a plan of repayment. In this case the court discusses inflated expenses and plan contributions against the super discharge available in a Chapter 13.

In re Forbes, 218 B.R. 48, (B.A.P. 8th Cir. 1998)

Creditor's pending motion to dismiss Chapter 13 case was rendered moot by entry of discharge after debtor made final payment under plan.

In re Van Der Heide, 219 B.R. 830 (B.A.P. 8th Cir. 1998)(reversed)

Because the estate includes property held as a tenant by the entirety and because not all of the property's value was being made available for distribution, the plan violated the "best intent of creditors" test under § 1325(d)(4).

In re Minkes, 237 B.R. 476 (B.A.P. 8th Cir. 1999)

Section 1307, providing for dismissal of a Chapter 13, case requires a request of a party in interest or the trustee, notice and application for hearing and a showing of cause. The failure of one plan to achieve confirmation is not, by itself, sufficient cause for dismissal.

In re Kurtz, 238 B.R. 826 (Bankr. D.N.D. 1999)

In this case the court, citing *Zaleski*, 216 B.R. 425 (Bankr. D.N.D. 1997), recounts the test employed in determining whether a Chapter 13 plan has been proposed in good faith, noting that the motivation in seeking Chapter 13 relief rather than

Chapter 7 is important to the inquiry.

In re Banks, 248 B.R. 799 (B.A.P. 8th Cir. 2000)

Although seeking Chapter 13 relief to avoid the effects of state court litigation is not per se bad faith, a debtor's motivation and sincerity in seeking relief must be considered. Where the filing occurs after years of rancorous litigation and on the heels of an adverse supreme court decision, the circumstances support a finding of bad faith.

In re Novak, 252 B.R. 487 (Bankr. D.N.D. 2000)

In this case, a Chapter 12, the court determined that the "best interest of creditors test" (§ 1325(a)(4)) requires performing a hypothetical liquidation analysis independent of projected disposable income.

In re Wilson, 252 B.R. 739 (B.A.P. 8th Cir. 2000)

Here the court discusses section 1328(a)(3) concluding that the term "conviction" as used in the section includes a plea of guilty followed by a sentence of probation, despite the absence of the formal entry of conviction. Thus, any restitution obligation arising in connection with a probation constitutes a debt for restitution and is excepted from discharge in Chapter 13.

In re Little, 253 B.R. 427 (B.A.P. 8th Cir. 2000)

An appeal becomes moot if it is impossible to grant effective relief or if there is no ongoing controversy. In this case a Chapter 7 trustee's motion to reconvert a Chapter 13 case back to Chapter 7 case was too late as no stay was in place, a plan had been confirmed, and the Chapter 13 trustee had undertaken distribution pursuant to the plan.

CLAIMS

First Nat. Bank v. Allen, 118 F.3d 1289 (8th Cir. 1997)

A confirmed plan is a binding contract on all parties and the failure of a creditor to object to plan treatment or claim omission may constitute a waiver of the claims.

In re Hairopoulos, 118 F.3d 1240 (8th Cir. 1997)

A claim is not "provided for" in a plan if an omitted creditor has not received notice. Notice under § 342(a) and Rule 2002 means appropriate notice with the burden of proof resting on the debtor.

In re Olson, 120 F.3d 98 (8th Cir. 1997)

The language of Rule 3001(e)(2) regarding the transfer of claims is mandatory and unless an unsecured creditor objects, the court has no authority to disallow the transfer.

Stillmunkes v. Hy-Vee Employee Ben. Plan and Trust, 127 F.3d 767 (8th Cir. 1997)

Because employee benefit plan, as self-funded ERISA plan, was exempt from Iowa statutes regulating subrogation, Chapter 7 debtors were not entitled to have plan's claim for reimbursement of paid medical expenses reduced pursuant to those statutes.

In re Barcal, 213 B.R. 1008 (B.A.P. 8th Cir. 1997)

Disputed non-contingent and liquidated debts must be included in the § 109(e) Chapter 13 qualification. "Contempt debts" are those in which the obligation to pay does not arise until the occurrence of a triggering event. A "liquidated debt" is one that is readily calculable or readily determinable.

First Bank Investors Trust v. Tarkio College, 129 F.3 471 (8th Cir. 1997)

Under Missouri law, an accelleration clause in a note is not automatic and failure of a debtor to pay a note when due does not operate by itself to accellerate the debt.

In re Mosbrucker, 220 B.R. 656 (Bankr. D.N.D. 1998)

Portions of IRS claim comprised of civil penalties for Chapter 12 debtors' failure to pay trust fund taxes and prepetition interest on debtors' tax liabilities qualified for priority status and were nondischargeable.

In re Fairfield Communities, Inc., 142 F.3d 1093 (8th Cir. 1998)

Once a plan is confirmed and the estate ceases to exist, a court may retain jurisdiction via plan language. However, neither the plan nor courts with retained jurisdiction have any authority over contracts or claims arising after confirmation.

In re Lockwood Corp., 223 B.R. 170 (B.A.P. 8th Cir. 1998)

> Bound by the holding of In re Hen House Interstate, Inc., 150 F.3d 868 (8th Cir. 1998), the BAP allowed that a creditor has standing to maintain a section 506(c) surcharge claim providing the several elements of section 506(c) can be met,immunizing agreements notwithstanding.

In re Direct Transit, Inc., 226 B.R. 198 (B.A.P. 8th Cir. 1998)

> A contract provision for liquidated damages, if enforceable under applicable state law, are recoverable in bankruptcy under § 506(b) to the extent the secured party actually incurred damages.

In re Kieffer-Mickes, Inc., 226 B.R. 204 (B.A.P. 8th Cir. 1998)

> A debtor generally has no standing to object to claims against the estate because the debtor has no interest in the estate assets. An exception to this rule arises where disallowance of a claim would produce a surplus.

In re Yanke, 230 B.R. 374 (B.A.P. 8th Cir. 1999)

> An insurer, upon payment of a loss, becomes subrogated to the remedies of the principal. A resulting satisfaction of judgment does not extinguish the insurer's right to equitable subrogation and it could maintain a nondischargeability action against the debtor under § 523(a)(4).

Cohen v. de la Cruz, 118 S. Ct. 1212 (1998)

> Reflecting on the language of § 573(a)(2)(A), the Court expansively defines the terms "claim" and "debt" to include all liability arising out of fraud including punitive damages.

In re Hen House Interstate, Inc., 177 F.3d 719 (8th Cir. 1999)

> In an en banc decision, the Circuit reversed its earlier Hen House decision (150 F.3d 868) and overrules United States, Internal Revenue Service v. Boatmen's First National Bank, 5 F.3d 1157 (8th Cir. 1993), holding that only a trustee may seek to surcharge a secured creditor's collateral pursuant to section 506(b).

In re Consumers Realty & Development Co., Inc., 238 B.R. 418 (B.A.P. 8th Cir. 1999)

> A properly filed proof of claim is prima facie evidence of its validity requiring the

objector to rebut it with enough evidence to shift the ultimate burden of persausion back to the claimant.

In re Interco, Inc., 186 F.3d 1032 (8th Cir. 1999)

The failure to file a timely claim on a rejected executory contract was not excused under § 9006(b)(1)(2) as the creditor had 4 weeks notice.

Raleigh v. Illinois Dept. of Revenue, __ U.S. __, 2000 WL 684179 (2000)

In tax claims the burden of proof is an essential element of the claim itself. As regards tax claims in bankruptcy, the ultimate burden of proof remains with the tax payer if that is where the relevant tax code put it, regardless of the intervention of bankruptcy and despite Bankruptcy Rule 3001(f) which shifts the ultimate risk of nonpersuasion to the claimant. (This decision appears to reverse *In re Brown*, 82 F.3d 801 (8th Cir. 1996).

In re Westpointe L.P., 241 F.3d 1005 (8th Cir. 2001)

An undersecured creditor who files a valid proof of claim for the full indebtedness is entitled to having the entire amount treated as one allowed claim pursuant to § 1111(a) where the debtor fails to raise an objection.

COLLATERAL ESTOPPEL

In re Cochrane, 124 F.3d 978 (8th Cir. 1997)

Here the court reiterates that principle of collateral estoppel applies in bankruptcy court to bar relitigation of factual or legal issues determined in a prior state court action. The court recites the four elements that must be present for application of the doctrine citing Johnson v. Miera, 926 F.2d 741 (8th Cir. 1991).

In re Novotny, 224 B.R. 917 (Bankr. D.N.D. 1998)

A negotiated plea agreement to second degree murder coupled with a stipulated civil judgment providing that the defendant "intentionally and maliciously" committed the act, did not render the judgment nondischargeable by reason of collateral estoppel. From the record presented, the factual basis for the state court's finding of "intentional amd malicious" was unclear. Also uncertain was whether this was the same standard as "willful and malicious" under § 523(a)(6).

In re Slominski, 229 B.R. 432 (Bankr. D.N.D. 1998)

This case recites the elements necessary for collateral estoppel, concluding that collateral estoppel does not apply to a default judgment.

In re Tuttle, 230 B.R. 155 (Bankr. D.N.D. 1999)

State administrative agency decisions will be accorded collateral estoppel effect providing they meet the same criteria applied to state court determinations with the most difficult being the "actually litigated" requirement.

In re Scarborough, 171 F.3d 638 (8th Cir. 1999)

In determining whether to apply collateral estoppel to a state court judgment, federal courts must look to substantive law of the forum state. Here circuit determines that a jury determination of malicious prosecution met all the requirements for collateral estoppel to apply.

In re Madsen, 195 F.3d 988 (8th Cir. 1999)

Restating the elements of collateral estoppel, the circuit holds that a state-court jury finding that the debtor "willfully and maliciously" misappropriated property satisfied the definition under § 523(a)(6) and had collateral estoppel effect in subsequent dischargeability proceedings. The court looked to the definitions set out in the jury instructions.

In re Marlar, 252 B.R. 743 (B.A.P. 8th Cir. 2000)

Discussing collateral estoppel in the context of a section 544(b) action, the court says that a trustee is not bound by a prior state court proceeding from bringing a section 544(b) fraudulent transfer action. This is so because the trustee is not merely the successor-in-interest to the debtor but represents all creditors.

In re Nelson, 255 B.R. 314 (Bankr. D.N.D. 2000)

In determining the preclusive effect of a probate court order, the bankruptcy court looks to the collateral estoppel law of the state. Here the court gave collateral estoppel effect to a probate court determination that a personal representative had misappropriated estate funds.

In re Maurer, 256 B.R. 495 (B.A.P. 8th Cir. 2000)

This case involved a complicated purchase contract which was considered by a

state trial court as well as an appellate court. Both courts agreed the plaintiff had proven a case of fraud. The bankruptcy court ruled that collateral estoppel precluded relitigation of the issue and the bankruptcy appellate panel agreed.

CONTEMPT

In re Just Brakes Corporate Systems, Inc., 108 F.3d 881 (8th Cir. 1997)

Contempt is a remedy for violating court orders, not statutes.

In re Waswick, 212 B.R. 350 (Bankr. D.N.D. 1997)

For § 524 contempt to lie, the burden rests with the movant to show by clear and convincing evidence that the offending creditor or entity had knowledge of the discharge and willfully violated it.

In re James, 257 B.R. 673 (B.A.P. 8th Cir. 2001)

Contempt is not an appropriate remedy for violation of the automatic stay because it is a remedy for violation of court orders, not statutes.

CONTRACTS

In re Craig, 144 F.3d 593 (8th Cir. 1998)

Recalling the definition of an executory contract (Northwest Airlines, Inc. v. Klinger, 563 F.2d 916 (8th Cir. 1977)), court holds that a promissory note was not an executory contract because its payment was not contingent upon the holder's performance of any duties that might exist under other contracts.

In re Popkins & Stern, 196 F.3d 933 (8th Cir. 1999)

In this case the circuit adheres to the rule that several instruments may constitute a single contract when they pertain to the same transaction and when the parties intended them to be construed as one.

In re Payless Cashways, 203 F.3d 1081 (8th Cir. 2000)

Affirming the BAP (230 BR. 120), the Circuit holds that in construing a contract, a court should apply the choice of law rules for the state in which it sits and for

a contract covering many states, should apply the "most significant relationship" test.

In re Digital Resource, LLC, 246 B.R. 357 (B.A.P. 8th Cir. 2000)

Rescission, while available as a remedy for breach, is an equitable remedy, available only where the injury from breach is irreparable and damages are difficult or impossible to determine.

In re Papio Keno Club, Inc., 247 B.R. 453 (B.A.P. 8th Cir. 2000)

Unambiguous contracts are governed by the language of the contract.

In re Callier, 251 B.R. 850 (B.A.P. 8th Cir. 2000)

A deed cannot be reformed based upon the mistake of one party to the conveyance because under applicable state law there must be a mutual mistake of both parties to the instrument. This decision discusses in detail reformation of contracts based on mistake.

In re Innovative Softwear Designs,Inc., 253 B.R. 40 (B.A.P. 8th Cir. 2000)

Abandonment of a contract may be established by clear and convincing evidence of an intent to abandon contract rights.

CONVERSION OF CASE

In re Ladika, 215 B.R. 720 (B.A.P. 8th Cir. 1998)

Bad faith, sufficient for the conversion of a Chapter 13 case to a Chapter 7, turns upon a case-by-case evaluation of the circumstances in light of the general purpose of Chapter 13. The filing of a Chapter 13 petition in an effort to evade federal taxes constitutes an abuse of the Bankruptcy Code. (citing Molitor, 76 F.3d 218 (8th Cir 1996)).

CORPORATIONS

Stoebner v. Lingenfelter, 115 F.3d 576 (8th Cir. 1997)

In Chapter 7 trustee's fraudulent transfer proceeding, reverse piercing of debtor's corporate veil was not warranted under Minnesota law to show that debtor's principal received value when debtor purchased certain historical documents from transferee and

delivered them to another company owned by principal.

In re Erdman, 236 B.R. 904 (Bankr. D.N.D. 1999)

In this case court discusses elements that must be established under North Dakota case law in order to justify piercing the corporate veil, that the elements devolve into basically injustice, inequity and fundamental unfairness.

CRIMINAL LAW

U.S. v. Novak, 217 F.3d 566 (8th Cir. 2000)

In this case involving criminal bankruptcy fraud, the court stated that a debtor must disclose all property interests even though its status may be uncertain and even if it is later determined not to be property of the estate. The failure to do so is a fraud upon the court.

DAMAGES

In re Just Brakes Corporate Systems, Inc., 108 F.3d 881 (8th Cir. 1997)

Damages under § 362(h) is the only remedy available for a violation of the automatic stay. However, damages for willful violation of the stay under § 362(h) only applies to "individual" as opposed to "corporate" debtors.

In re Usery, 123 F.3d 1089 (8th Cir. 1997)

In calculating the measure of changes arising out of fraud, the court must consider the difference between the actual value of the property and its value had it been as represented.

In re Direct Transit, Inc., 226 B.R. 198 (B.A.P. 8th Cir. 1998)

A contract provision for liquidated damages, if enforceable under applicable state law, are recoverable in bankruptcy under § 506(b) to the extent the secured party actually incurred damages.

In re Usery, 242 B.R. 450 (B.A.P. 8th Cir. 1999)

The appellate panel deciding an appeal of an issue decided on remand, concluded the trial court had properly applied the circuit's test for damage calculation.

In re Digital Resource, LLC, 246 B.R. 357 (B.A.P. 8th Cir. 2000)

> Rescission, while available as a remedy for breach, is an equitable remedy, available only where the injury from breach is irreparable and damages are difficult or impossible to determine.

In re Papio Keno Club, Inc., 247 B.R. 453 (B.A.P. 8th Cir. 2000)

> In this case the court discusses the concept of liquidated damages.

DENIAL OF DISCHARGE

In re Olmstead, 220 B.R. 986 (Bankr. D.N.D. 1998)

> Revocation of Chapter 7 debtor's discharge was warranted by her conduct in understating income and amount of cash she had on hand and failing to disclose checking accounts into which she made substantial deposits.

In re Wolfe, 232 B.R. 741 (B.A.P. 8th Cir. 1999)

> Section 727(a)(3) imposes a standard of reasonableness with the debtor required to take such steps as ordinary fair dealing and common caution would dictate. Once an objecting party has made a prima facie case of inadequate recordkeeping, the burden falls to debtor to justify his recordkeeping habits.

In re McLaren, 236 B.R. 882 (Bankr. D.N.D. 1999)

> In this case the court recounts the historical interpretation of § 727(a)(4)(A) in the district of North Dakota, once again saying debtors have a duty of complete, accurate disclosure. Reliance upon an attorney to properly complete schedules assumes information given to the attorney is correct. Moreover, debtor has duty to review the documents before being filed with the court.

In re Sears, 246 B.R. 341 (B.A.P. 8th Cir. 2000)

> Citing Mertz v. Rott, 955 F.2d 596 (8th Cir. 1992), BAP restates the rule that a material misrepresentation or omission, if done with knowledge and fraudulent intent, will merit denial of discharge. Knowledge and intent can be inferred from the facts.

U.S. v. Novak, 217 F.3d 566 (8th Cir. 2000)

In this case involving criminal bankruptcy fraud, the court stated that a debtor must disclose all property interests even though its status may be uncertain and even if it is later determined not to be property of the estate. The failure to do so is a fraud upon the court.

DISCHARGE

In re Kasden, 209 B.R. 239 (B.A.P. 8th Cir. 1997)

Evidence supported finding that discharged debtor had knowingly and fraudulently failed to report and turn over estate property, supporting revocation of discharge.

In re Kasden, 209 B.R. 236 (B.A.P. 8th Cir. 1997)

Allegations in Chapter 7 trustee's complaint did not support judgment finding estate, as opposed to debtor or some other party, to be owner of personal property.

In re Tatge, 212 B.R. 604 (B.A.P. 8th Cir. 1997)

Chapter 7 debtor's obligation to make mortgage payments on home occupied by his children and former spouse, pursuant to parties' marital dissolution decree, was excepted from discharge as award for alimony, maintenance, or support.

In re Johnson, 218 B.R. 449 (B.A.P. 8th Cir. 1998)

Adopting a broad definition of the word "loan," the court holds that an extension of credit for tuition, books & expenses is a loan for purposes of section 523(a)(8) despite the fact that no money changed hands.

In re Alport, 144 F.3d 1163 (8th Cir. 1998)

Debt to custom-home purchasers arising from failure of Chapter 7 debtor's companies to pay materialmen and subcontractors for work performed on house fell within fraud discharge exception.

In re Slominski, 229 B.R. 432 (Bankr. D.N.D. 1998)

In this case the court again discusses section 523(a)(6) and the redefined term, "willfulness," noting that in the wake of Geiger a creditor's burden of proof is difficult. A creditor must prove not only the debtor intended to convert collateral but must also have intended the resultant harm.

In re Yanke, 230 B.R. 374 (B.A.P. 8th Cir. 1999)

> An insurer, upon payment of a loss, becomes subrogated to the remedies of the principal. A resulting satisfaction of judgment does not extinguish the insurer's right to equitable subrogation and it could maintain a nondischargeability action against the debtor under § 523(a)(4).

In re Andersen, 232 B.R. 127 (B.A.P. 8th Cir. 1999)

> The Appellate Panel concludes that there is no statutory authority, in making an undue hardship determination, to grant a partial discharge. Section 523(a)(8) is clear and unambiguous. However, it should be applied to each loan separately. The court also reviewed the various "undue hardship" tests concluding that the best measure is the "totality of the circumstances" in a particular case, citing *In re Andrews*, 661 F.2d 702 (8th Cir. 1981).

In re Scarborough, 171 F.3d 638 (8th Cir. 1999)

> If a debtor's actions are found to be both willful and malicious, then all damages including actual and punitive, if based on the same conduct, will be nondischargeable under § 523(a)(6). The applicability of the section is defined by the nature of the act and applies to all liabilities flowing therefrom.

In re Keim, 236 B.R. 400 (B.A.P. 8th Cir. 1999)

> In this case the court recounts the elements necessary for nondischargeability under § 523(a)(2)(B) saying that the "reasonableness" of a creditors reliance must be made in light of all the circumstances. Putting blind faith in an incomplete financial statement which on its face contains information suggestive of further inquiry and verification is not reasonable.

In re Moen, 238 B.R. 785 (B.A.P. 8th Cir. 1999)

> The court, recounting the elements of non-discharge under § 523(a)(2)(A), concludes it was fraudulent for a sophisticated borrower to take advantage of a bank's mistake by drawing upon a line of credit he knew was null and void. Deceit occurs when one fails to alert the bank to circumstances which, if known, would affect the lending decision.

In re Kopp, 255 B.R. 230 (Bankr. D.N.D. 2000)

> To escape nondischargeability under § 523(a)(15) a debtor must show either the

he has an inability to pay the debt or that its discharge would provide him a benefit outweighing the detriment caused the spouse/creditor. In this case the facts revealed no discretionary funds, given a net monthly income of $1,122.00 and expenses of $1,074.00.

DISCHARGEABILITY

First Nat. Bank, Olathe, Kan. v. Pontow., 111 F.3d 604 (8th Cir. 1997)

The determination of reasonable reliance under § 523(a)(2)(B) is to be made in light of the totality of the circumstances.

In re Geiger, 113 F.3d 848 (8th Cir. 1997)

In a rehearing en banc the circuit held that a judgment debt cannot be excepted from discharge under § 523(a)(6) unless it is based upon an intentional tort--one that is based on the consequences of an act rather than the act itself. Unless the debtor desires to cause the consequences or believe the consequences are substantially certain to result, he has not committed an intentional tort. The dissent suggests this case was crafted as it was to shield medical malpractice judgments from § 523(a)(6). The element of "intent" under the statute does not require proof of a subjective intent to injure as the majority found. In re Long, 774 F.2d 875 (8th Cir. 1985) said that "willful" meant conduct which was headstrong and knowing. The dissent feels the majority is a significant departure from Long.

In re Wehri, 212 B.R. 963 (Bankr. D.N.D. 1997)

Although information provided on a financial statement was false, it was not "materially false" as it did not affect the decision to grant credit.

In re Cochrane, 124 F.3d 978 (8th Cir. 1997)

A fiduciary relationship must arise from an express or technical trust and in general, an attorney/client relationship is the type of relationship that may give rise to a finding of "defalcation" under section 523(a)(4). "Defalcation" does not require evidence of intentional fraud or other intentional wrongdoing. It includes innocent default by a fiduciary.

Kawaauhau v. Geiger, 118 S. Ct. 974 (1998)

Affirming the 8th Circuit decision of In re Geiger, 113 F.3d 848 (8th Cir., 1997),

the court held that § 523(a)(6) is to be strictly interpreted. "Willful" means a deliberate or intentional injury not merely a deliberate or intentional act. § 523(a)(6) does not cover situations where the act is intentional but injury is unintended.

Cohen v. de la Cruz, 118 S. Ct. 1212 (1998)

Section 523(a)(2)(A) prevents the discharge of all liability arising from fraud including treble damages, punitive damages, attorneys fees and any other relief that may exceed the value obtained by the debtor. In this case the Supreme Court defines the terms "debt" and "claim".

In re Feist, 225 B.R. 450 (Bankr. D.N.D. 1998)

Discussing the elements of willfulness and maliciousness in the wake of Geiger, 118 S. Ct. 974, and applying the standard to claims of waste and other damage to property, the court holds that the evidence must show the debtor acted to deliberately injure the property owner, fully expecting to harm her economic interests.

In re Novotny, 226 B.R. 211 (Bankr. D.N.D. 1998)

Applying the Geiger standard, this court concludes that a wrongful death award as a consequence of debtor shooting and killing his girlfriend was a debt for willful and malicious injury. Here the court concluded that "malice" is conduct without just cause or excuse.

In re Erdman, 236 B.R. 904 (Bankr. D.N.D. 1999)

Here court discusses § 523(a)(2)(A) and the element of "justifiable reliance" in the context of false statements and omitted information.

In re Montgomery, 236 B.R. 914 (Bankr. D.N.D. 1999)

The wrongful appropriation of a driver training facility by an employee may constitute embezzlement under section 523(a)(4).

In re Guske, 243 B.R. 359 (B.A.P. 8th Cir. 2000)

Although the "justifiable reliance" standard of § 523(a)(2)(A) is fairly low, a creditor has not met his burden where the misrepresented fact is known by him

to be false or is obviously false.

In re Grause, 245 B.R. 95 (B.A.P. 8th Cir. 2000)

In this case the court discusses the elements of § 523(a)(2)(A) in the context of credit card abuse and adopts a list of nonexclusive factors first set forth in In re Daugherty, 84 B.R. 653 (9th Cir. B.A.P. 1988) as aids to determining fraudulent intent. These factors, however, are merely to serve as an aid and courts should review the complete circumstances of the case before it.

In re May, 251 B.R. 714 (B.A.P. 8th Cir. 2000)

Section 523(a)(1)(C) prevents the discharge of taxes if debtor willfully attempted to evade the tax. A willful attempt may be gleaned from a scheme, concealment, evasive conduct.

In re Nelson, 255 B.R. 314 (Bankr. D.N.D. 2000)

Here the court found that misappropriation of funds by a personal representative constituted a fraud or defalcation within the meaning of section 523(a)(4).

In re Maurer, 256 B.R. 495 (B.A.P. 8th Cir. 2000)

This case involved a complicated purchase contract which was considered by a state trial court as well as an appellate court. Both courts agreed the plaintiff had proven a case of fraud. The bankruptcy court ruled that collateral estoppel precluded relitigation of the issue and the bankruptcy appellate panel agreed.

In re Fors, 259 B.R. 131 (B.A.P. 8th Cir. 2001)

Recounting the elements for nondischarge under section 523(a)(6), the BAP concludes that a chiropractor's conduct in making a patient sexually submissive was "willful" and "malicious". Malicious intent can be established by circumstancial evidence.

DISMISSAL

In re Minkes, 237 B.R. 476 (B.A.P. 8th Cir. 1999)

Section 1307, providing for dismissal of a Chapter 13 case, requires a request of a party in interest or the trustee, notice and application for hearing and a showing of cause. The failure of one plan to achieve confirmation is not, by itself,

sufficient cause for dismissal.

In re Turpen, 244 B.R. 431 (B.A.P. 8th Cir. 2000)

> Unlike Chapter 13, a Chapter 7 debtor has no absolute right to voluntarily dismiss a Chapter 7 case. Rather, a Chapter 7 debtor must, by a showing of cause, demonstrate that dismissal is justified and that creditors will not be prejudiced.

In re Tolbert, 255 B.R. 214 (B.A.P. 8th Cir. 2000)

> Affirming the bankruptcy court, the B.A.P. concludes that dismissal of a Chapter 13 case with prejudice is appropriate where debtor filed six cases within three years and none were accompanied by schedules or a plan.

In re Cedar Shore Resort, Inc., 235 F.3d 375 (8th Cir. 2000)

> Filing a Chapter 11 petition primarily for the purpose of getting rid of a lawsuit may constitute bad faith and the filing of a confirmable reorganization plan will not save the case from dismissal. In this case the circuit discusses the legitimate purpose of Chapter 11 reorganization concluding that filing for the purpose of gaining litigation advantage is not a valid reason.

In re Midland Marina, Inc., 259 B.R. 683 (B.A.P. 8th Cir. 2001)

> Dismissal is directed to the sound discretion of the court and is appropriate if in the best interest of creditors and the estate.

DIVORCE, ALIMONY & PROPERTY SETTLEMENT

In re Tatge, 212 B.R. 604 (B.A.P. 8th Cir. 1997)

> Chapter 7 debtor's obligation to make mortgage payments on home occupied by his children and former spouse, pursuant to parties' marital dissolution decree, was excepted from discharge as award for alimony, maintenance, or support.

In re Kubik, 215 B.R. 595 (Bankr. D.N.D. 1997)

> The assumption of an outstanding mortgage obligation on the family home is a nondischargeagle support obligation given the intent and function served by the obligator--the maintenance of the family home.

In re Moeder, 220 B.R. 52 (B.A.P. 8th Cir. 1998)

In this case the Court recites the factors relevant to whether a debt constitutes alimony, maintenance or support under section 523(a)(5). The Court further held that a property settlement will be dischargeable if either of the two exceptions of section 523(a)(15) apply with the burden of proof lying with the debtor to show that one of those exceptions applies. Once an objecting creditor proves the debt constitutes a property settlement the burden shifts to the debtor.

In re Beach, 220 B.R. 651 (Bankr. D.N.D. 1998)

In this case the Court recounts the elements of § 523(a)(5) and (a)(15) concluding that an obligation to pay the unpaid balance owing on mobile home occupied as family home was the functional equivalent of support. Under § 523(a)(15) there is a rebuttable presumption of nondischargeability of any property settlement with the debtor bearing the burden of proof over the alternative exceptions to nondischargeability.

In re Henry, 238 B.R. 472 (Bankr. D.N.D. 1999)

Under § 523(c), a state court has concurrent jurisdiction to determine the dischargeable nature of its own award.

In re Henry, 239 B.R. 812 (Bankr. D.N.D. 1999)

The test for determining whether an award constitutes "support" is the function the award was meant to serve. It is, however, inappropriate to the examination to consider whether the support award was excessive or unreasonable. That is a matter left to state courts.

In re McLain, 241 B.R. 415 (B.A.P. 8th Cir. 1999)

Although how a divorce decree characterizes a debt is not binding, a bankruptcy court may look to the language of a decree or stipulation for an expression of the parties' intent. Clear expressions of intent contained in such documents cannot be overcome by contradictory, self-serving testimony.

In re Kemp, 242 B.R. 178 (B.A.P. 8th Cir. 1999)aff'd 232 F3d 652

A state court award issued to a non-spouse birthing mother nonetheless constitutes nondischargeable child support.

In re Kopp, 255 B.R. 230 (Bankr. D.N.D. 2000)

To escape nondischargeability under § 523(a)(15) a debtor must show either the he has an inability to pay the debt or that its discharge would provide him a benefit outweighing the detriment caused the spouse/creditor. In this case the facts revealed no discretionary funds, given a net monthly income of $1,122.00 and expenses of $1,074.00.

In re Kemp, 232 F.3d 652 (8th Cir. 2000)

Affirming the BAP (242 B.R. 178), the Circuit holds that it is the notice of the debt not the identity of the payee that determines dischargeability under section 523(a)(5).

In re Fellner, 256 F.R. 898 (B.A.P. 8th Cir. 2000)

The court discusses nondischarge in the context of section 523(a)(15) concluding that transportation expenses of $500 were excessive in the face of outstanding marital debts.

In re Grossman, 259 B.R. 708 (Bankr. D.N.D. 2001)

Even if the elements for discharge under § 523(a)(15) are met, an award of future pension benefits cannot be discharged because the award did not represent a pre-petition"debt" presently due and payable. In this case the court makes a distinction between a present-lump sum award and an award of benefits coming due in the future.

In re Vargason, 260 B.R. 488 (Bankr. D.N.D. 2001)

In this case the court discusses the validity of an order for alimony issued during the pendency of a bankruptcy case, concluding that section 362(b)(2) creates an exception for modification or commencement of an action for alimony. See In re Kopp, 622 N.W.2d 726 (N.D. 2000) for further discussion of post-discharge remedies.

EXECUTORY CONTRACT

In re Family Snacks, Inc., 257 B.R. 884 (B.A.P. 8th Cir. 2001)

In this complex case the court discusses the interplay between sections 365 and 1113 and the ability of a Chapter 11 debtor to reject a collective bargaining agreement after all its assets are sold.

EXEMPTIONS

Eilbert v. Pelican, 212 B.R. 954 (B.A.P. 8th Cir. 1997)

> Citing Iowa law, the court held that the statute affording an exemption for annuities is designed to protect payments received as wage substitutes after retirement and does not shield lump-sum investments purchased by the debtor over which she maintains control. The court relied upon Huebner, 986 F.2d 1222 (8th Cir. 1993),(aff'd In re Eilbert, 167 F.3d 523 (8th Cir. 1998).

In re Becker, 215 B.R. 585 (B.A.P. 8th Cir. 1998)

> Interpreting Minnesota homestead exemption law, the court held that the availability of the exemption turns upon the character of the subject acreage where surrounding land is neither exclusively urban or rural.

In re Martin, 140 F.3d 806 (8th Cir. 1998)

> The § 522(d)(5) "wild card" exemption is available even though the debtor has not claimed a homestead exemption.

In re Hankel, 223 B.R. 728 (Bankr. D.N.D. 1998)

> For the "head of family" exemption to stand, the claimant must have someone under his "care and maintenance" - a term meaning physical custody of a person who is unable to take care of or support themselves.

In re Miller, 224 B.R. 913 (Bankr. D.N.D. 1998)

> Before an exemption may be claimed in property, the property must first be estate property. ERISA-qualified plans never become property of the bankruptcy estate and thus cannot be the object of exemption.

In re Eilbert, 162 F.3d 523 (8th Cir. 1998)

> Affirming the B.A.P., the circuit holds that single premium annuity contracts purchased with non-exempt assets as a prebankruptcy planning measure are not exempt under statutes providing for the exemption of "pension, annuity, or similar plan or contract."

In re Van Der Heide, 164 F.3d 1183 (8th Cir. 1999)

If homestead property is owned by more than one person, a single owner may exempt the entire amount.

In re Pruss, 235 B.R. 430 (B.A.P. 8th Cir. 1999)

Construing Nebraska law and the Bankruptcy Code definition of "earnings," the B.A.P. concludes that fees generated by an attorney are "earnings" and may be exempted.

In re Alexander, 239 B.R. 911 (B.A.P. 8th Cir. 1999)

Here, the court following In re Harris, 886 F.2d 1011 (8th Cir. 1989), states that in a case converted from Chapter 13 to Chapter 7, exemptions are determined as of the original Chapter 13 petition date.

In re Kemmerer, 251 B.R. 50 (B.A.P. 8th Cir. 2000)

Applying Iowa law, the Court determined that an "individual retirement annuity" is distinguishable from an "individual retirement account" and is not exemptible. The dissent thought them indistinguishable under Iowa law.

In re Shaldon, 217 F.3d 1006 (8th Cir. 2000)

An exemption may be denied where the evidence suggests the debtor converted non-exempt property to exempt property with an intent to defraud. The mere fact of conversion is not sufficient but the court may refer to badges of fraud to infer fraudulent intent.

In re Alexander, 236 F.3d 431 (8th Cir. 2001)

Affirming the Bankruptcy Appellate Panel (239 B.R. 911), the circuit overrules In re Lindberg, 735 F.2d 1087 (8th Cir. 1984) saying that property of the estate in a converted case is determined as of the date of the original petition.

In re Andersen, 259 B.R. 687 (B.A.P. 8th Cir. 2001)

In this case the court examines the function of pensions and annuities and the circumstances by which otherwise non-exempt assets may be used to purchase an exempt annuity.

FARMERS

In re Wald, 211 B.R. 359 (Bankr. D.N.D. 1997)

> Debtors unrealistic projections coupled with failed prior Chapter 12 cases including one in which they stipulated to relief from stay in the event of default demonstrated bad faith and constituted cause for relief from stay. Absent special circumstances it is bad faith for a debtor to refile as a means of avoiding the effects of a stipulation for relief from stay upon plan default.

In re Sauer, 223 B.R. 715 (Bankr. D.N.D. 1998)

> Here the court again discusses the element of feasibility concluding that the budget projections are unsupported by the evidence and are unrealistic when gauged against historical realities.

In re Alvstad, 223 B.R. 733 (Bankr. D.N.D. 1998)

> As stated in many prior decisions, projections must be based upon realistic and objective facts.

In re Tofsrud, 230 B.R. 862 (Bankr. D.N.D. 1999)

> Feasibility of a Chapter 12 plan rests upon realistic and objective facts tending to demonstrate an ability to cash flow.

In re Barger, 233 B.R. 80 (B.A.P. 8th Cir. 1999)

> The consideration of whether a Chapter 12 plan has been proposed in good faith turns upon a totality of the circumstances with the focus upon confirmation prospects, the accuracy of financial data, the existence of fraudulent misrepresentations and Code manipulation. Here the court is guided by principles set down in *In re Everle Farms, Inc*., 861 F.2d 1089 (8th Cir. 1988)

Haden v. Pelofsky, 212 F.3d 466 (8th Cir. 2000)

> This case concerned Chapter 12 plan language permitting direct payment to creditors without payment of any trustee's fee. Here the bankruptcy court permitted direct payment of impaired and unimpaired secured claims and administrative claims but did not permit direct payment of child support. The circuit affirmed. Revisiting *Wagner* 36 F.3d 723 (8th Cir. 1999), the circuit said while *Wagner* does not mandate confirmation of all direct payment plans, it does permit them without restriction so long as the plan is feasible and the payments do not interfere with the trustee's duties.

In re Novak, 252 B.R 487 (Bankr. D.N.D. 2000)

> The "best interest of creditors test" set out in § 1225(a)(4) (§ 1325(a)(4) in Chapter 13) requires the court to perform a hypothetical liquidation analysis as of the effective date of the plan. The value of the current year's growing crops must be factored into the analysis.

In re Wagner, 259 B.R. 694 (B.A.P. 8th Cir. 2001)

> This is a farm reorganization brought under Chapter 13. The court concluded that a plan is not infeasible per se because of a proposed three year balloon payment. The source and amount of the payment is important as are other factors.

FIDUCIARIES

In re Broadview Lumber Co., Inc., 118 F.3d 1246 (8th Cir. 1997)

> Under the Uniform Fiduciaries Law, actual knowledge requires a present awareness that a fiduciary is breaching his duty for personal gain.

In re Cochrane, 124 F.3d 978 (8th Cir. 1997)

> A fiduciary relationship must arise from an express or technical trust and in general, an attorney/client relationship is the type of relationship that may give rise to a finding of "defalcation" under section 523(a)(4). "Defalcation" does not require evidence of intentional fraud or other intentional wrongdoing. It includes innocent default by a fiduciary.

In re Nelson, 255 B.R. 314 (Bankr. D.N.D. 2000)

> Section 523(a)(4) requires an express or technical trust. Under North Dakota law, a fiduciary relationship exists between a personal representative and a decedent's estate. A misappropriation of funds by a personal representative is a defalcation while acting in a fiduciary capacity.

FINANCE and BANKING

In re Western Iowa Farms Co., 135 F.3d 1257 (8th Cir. 1998)

> Bank acted in commercially reasonable manner when it accepted for deposit in signers' accounts checks drawn on debtor's account with forged endorsement.

FRAUD

In re Cochrane, 124 F.3d 978 (8th Cir. 1997)

> "Defalcation" under section 523(a)(4) does not require evidence of intentional fraud or other intentional wrongdoing. It may include an innocent default by a fiduciary.

FRAUDULENT TRANSFERS

In re Bargfrede, 117 F.3d 1078 (8th Cir. 1997)

> Transfers made solely for benefit of a third party do not furnish reasonably equivalent value under § 548 and intangible, psychological benefits inuring to the co-debtor spouse do not constitute consideration for purposes of § 548. Here co-debtor husband's pension was transferred to a co-debtor wife's creditor in partial satisfaction of a civil judgment against her.

In re Hatcher, 218 B.R. 441 (B.A.P. 8th Cir. 1998)

> Where the elements of a state fraudulent conveyance, itendical to a Bankruptcy Code cause of action, were considered by a state court, the debtor cannot relitigate the state-resolved claim in a federal forum. To do so amounts to federal appellate review of state court proceedings.

In re Young, 141 F.3 854 (8th Cir. 1998)

> Although found by the Supreme Court to be unconstitutional as regards *state law*, the Religious Freedom Restoration Act is constitutional as applied to *federal law*, says the Circuit. Reinstating In re Young, 82 F.3d 1407, the Court again holds that a debtor's religious tithe could not be recovered as a fraudulent conveyance.

Kelly v. Armstrong, 141 F.3d 799 (8th Cir. 1998)

> Instruction, in trustee's fraudulent transfer action, that jury could give presence or absence of badges of fraud such weight as jury thought their presence or absence deserved improperly permitted jury to allocate burden of proof to trustee despite finding existence of multiple badges of fraud.

In re Craig, 144 F.3d 587 (8th Cir. 1998)

> Under the Uniform Fraudulent Transfer Act, a "transfer" is defined broadly to

include both direct and indirect transfers of an asset or interest to a third party which ultimately benefits the transferee. It is broad enough to cover circuitous arrangements designed to shield assets from creditors.

In re Wintz Companies, 230 B.R. 848 (B.A.P. 8th Cir. 1999)

In order to avail himself of § 544(b), a trustee must first show there is an actual unsecured creditor who could maintain a fraudulent conveyance action under state law.

In this case, the court examines each of the elements necessary to maintain an action under the Uniform Fraudulent Transfer Act.

In re McLaren, 236 B.R. 882 (Bankr. D.N.D. 1999)

The elements essential to recovery of a fraudulent transfer under § 548(a) are discussed in detail, with the court concluding under the circumstances, the transfer of nearly all of the debtor's non-exempt assets to her husband in anticipation of bankruptcy and without any justification was fraudulent.

Kelly v. Armstrong, 206 F.3d 794 (8th Cir. 2000)

Under Section 548(a), a presumption of fraud may be shown through a confluence of the badges of fraud.

In re Marlar, 252 B.R. 743 (B.A.P. 8th Cir. 2000)

This case discusses the trustee's standing to bring an avoidance action under section 544(b), concluding that the section authorizes the trustee to avoid any transfer avoidable by a creditor under applicable state law. Furthermore, while the doctrines of res judicata and collateral estoppel apply, they have no effect on fraudulent transfer claims brought by a trustee because the trustee represents all creditors and is not merely the successor-in-interest to the debtor. Thus, trustee is not bound by prior state court proceedings. The case discusses in detail requisite elements for bringing a fraudulent conveyance action under § 544(b).

In re Popkin & Stern, 223 F.3d 764 (8th Cir. 2000)

Under Missouri law, a trustee was unable to recover the debtor's one-half interest in his mother's probate estate because he never received title or possession and had validly disclaimed any interest in her estate. Overruling the BAP (234 B.R. 724), the Circuit held that a valid disclaimer is a defense to fraudulent transfer

because no interest of the debtor was transferred.

HOMESTEAD EXEMPTION

In re Becker, 215 B.R. 585 (B.A.P. 8th Cir. 1998)

Interpreting Minnesota homestead exemption law, the court held that the availability of the exemption turns upon the character of the subject acreage where surrounding land is neither exclusively urban or rural.

In re Roberts, 219 B.R. 251 (B.A.P. 8th Cir. 1998)

Married-but-separated Chapter 7 debtors could claim Nebraska homestead exemption based solely on their marital status, even though neither qualified as "head of household."

In re Mueller, 215 B.R. 1018 (B.A.P. 8th Cir. 1998)

Under Minnesota exemption law, Chapter 7 debtor abandoned homestead and any exemption she might have had in proceeds therefrom by failing to file requisite notice within six months of date she vacated residence.

In re Hankel, 223 B.R. 728 (Bankr. D.N.D. 1998)

A debtor who had only a remainder interest in property which constituted his only place of residence and where he resided with his mother, the holder of a life estate, was not disqualified from declaring a homestead exemption under North Dakota law.

In re Van Der Heide, 164 F.3d 1183 (8th Cir. 1999)

If homestead property is owned by more than one person, a single owner may exempt the entire amount.

In re Shaldon, 217 F.3d 1006 (8th Cir. 2000)

An exemption may be denied where the evidence suggests the debtor converted non-exempt property to exempt property with an intent to defraud. The mere fact of conversion is not sufficient but the court may refer to badges of fraud to infer fraudulent intent.

In re Stenzel, 259 B.R. 141 (B.A.P. 8th Cir. 2001)

Applying the Minnesota homestead exemption, the court holds that occupancy refers to actual occupancy which is a legal, not merely a factual right. The subject property was a farm trust separated from the domiciled tract by a county highway and the debtor, while occupying and having an interest in the domiciled parcel, had no legal interest in the farm tract.

In re Abernathy, 259 B.R. 330 (B.A.P. 8th Cir. 2001)

Reconciling In re Gardner, 952 F.2d 237 and Van Der Heide, 164 F.3d 1183, the BAP concludes that in the context of joint tenancy, one of the joint tenants may claim the full homestead exemption.

INJUNCTION

In re Annen, 246 B.R. 337 (B.A.P. 8th Cir. 2000)

The post-discharge injunction provided by § 524(a)(2) applies only to in personam actions. It does not apply to in rem proceedings brought by a creditor to foreclose on liens that survived the discharge.

In re Smith, 259 B.R. 901 (B.A.P. 8th Cir. 2001)

In this case the court discusses the antidiscrimination provisions of section 525 in the context of a public housing authorities' right to terminate benefits and evict a debtor. The court concluded that a debtor may be terminated for default in contract terms and that section 525 does not operate to cure contractual defaults.

INTEREST

First Bank Investors Trust v. Tarkio College, 129 F.3 471 (8th Cir. 1997)

Under Missouri law, an accelleration clause in a note is not automatic and failure of a debtor to pay a note when due does not operate by itself to accellerate the debt.

INVOLUNTARY PROCEEDINGS

In re Feinberg, 238 B.R. 781 (B.A.P. 8th Cir. 1999)

The determination of "generally not paying debts" is factual, turning upon four general factors. Where all creditors are being paid save for one, the inquiry looks to issues of fraud, artifice, or inadequacy of state remedy.

JUDGMENTS

In re Danzig, 233 B.R. 85 (B.A.P. 8th Cir. 1999)

Creditors' petition for writ of scire facias to revive judgment against debtor was time-barred.

Sears, Roebuck & Co. v. O'Brien, 178 F.3d 962 (8th Cir. 1999)

Bankruptcy courts have power to issue declaratory judgments.

In re Erdman, 236 B.R. 904 (Bankr. D.N.D. 1999)

Implicit in a bankruptcy court's jurisdiction in cases where a specific sum has been determined nondischargeable, is the authority to enter a monetary judgment.

In re Henry, 238 B.R. 472 (Bankr. D.N.D. 1999)

Granting a motion for default judgment is discretionary and may be influenced by the merits of the movant's substantive claim.

In re Vierkant, 240 B.R. 317 (B.A.P. 8th Cir. 1999)

Default judgments entered after commencement of a bankruptcy case and while stay was in effect are void ab initio. Hence the judgment had no collateral estoppel effect in a 523(a)(6) action.

In re Washington, 248 B.R. 565 (B.A.P. 8th Cir. 2000)

Facts alleged in a complaint are deemed admitted where the defendant fails to answer and, if the allegations make out a claim for nondischarge, it is appropriate for default judgment to be entered.

In re Danzig, 217 F.3d 620 (8th Cir. 2000)

Affirming the B.A.P. (223 B.R. 85), the court holds under Missouri law that a judgment is presumed satisfied after ten years and an application for writ of scire facias was untimely.

JURISDICTION

*Crockett v. Lineberger***,** 205 B.R. 580 (8th Cir. 1997)

Bankruptcy appellate panel lacked subject matter jurisdiction over appeal when Chapter 7 debtor failed to file timely notice of appeal.

In re Moix-McNutt, 215 B.R. 405 (B.A.P. 8th Cir. 1997)

Bankruptcy court did not demonstrate gender bias by referring to debtor as housewife.

In re Yukon Energy Corp., 138 F.3d 1254 (8th Cir. 1998)

"Non-core" jurisdiction under 28 U.S.C. § 157 is broadly determined in order to promote judicial economy and aid in the expeditious resolution of all matters connected to the estate. Citing In re Dogpatch U.S.A., 810 F.2d 782 (8th Cir. 1987) and In re Titan Energy, Inc., 837 F.2d 325 (8th Cir. 1988) the Circuit reiterated that even a proceeding having a contingent or tangential effect on a debtor's estate meets the broad jurisdictional test.

In re Kearns, 219 B.R. 823 (B.A.P. 8th Cir. 1998) rev'd 177 F.3d 706 (8th Cir. 1999)

Chapter 11 debtor's failure to file proper claim for federal income tax refund rendered bankruptcy court without subject matter jurisdiction to determine whether debtor was entitled to refund and whether debtor was entitled to use any such refund to offset federal income tax.

In re Fairfield Communities, Inc., 142 F.3d 1093 (8th Cir. 1998)

Once a plan is confirmed and the estate ceases to exist, a court may retain jurisdiction via plan language. However, neither the plan nor courts with retained jurisdiction have any authority over contracts or claims arising after confirmation.

In re Federal Fountain, Inc., 143 F.3d 1138 (8th Cir. 1998)

Given Chapter 7 trustee's failure to adduce any evidence indicating what contacts, if any, out-of-state corporation had with forum state, adversary proceeding in which trustee sought to collect balance due on contract owed by corporation to debtor was properly dismissed for lack of personal jurisdiction.

Wolfe v. Gilmour Mfg. Co., 143 F.3d 1122 (8th Cir. 1998)

Debtor-plaintiff lacked standing to file, postpetition, negligence action that arose

prepetition and involved claim that had not been abandoned by bankruptcy trustee.

In re Federal Fountain, Inc., 165 F.3d 600 (8th Cir. 1999)

Federal Rule of Bankruptcy Procedure 7004(d) on its face allows for nationwide service of process irrespective of whether there are contacts between the defendant and the state where its appearance is sought. Merely being present in the territory of the United States is sufficient contact for courts to exercise authority.

U.S. v. Kearns, 177 F.3d 706 (8th Cir. 1999)

Reversing the B.A.P., In re Kearns, 219 B.R. 823, the Circuit held that the bankruptcy court had subject matter jurisdiction under section 505 to determine the issue of carry-back deductions directly related to the tax liability claim.

In re Henry, 238 B.R. 472 (Bankr. D.N.D. 1999)

Under § 523(c), a state court has concurrent jurisdiction to determine the dischargeable nature of its own award.

In re Rose, 187 F.3d 926 (8th Cir. 1999)

In this, the first 8th Circuit case discussing Seminole Tribe v. Florida, 517 U.S. 44 (1996), the circuit acknowledged that the Eleventh Amendment can bar federal actions by private parties against a state. However, submission of a proof of claim by a state is sufficient to waive any immunity it might have.

In re May, 251 B.R. 714 (B.A.P. 8th Cir. 2000)

Eleventh Amendment sovereign immunity is jurisdictional and courts must examine it sua sponte. A waiver only arises from an unequivocable express consent to jurisdiction such as an affirmative request for relief such as a counterclaim. The mere filing of an answer is not a waiver.

In re Williams, 256 B.R. 885 (B.A.P. 8th Cir. 2000)

Bankruptcy courts return jurisdiction after dismissal or closing of a case to interpret and enforce orders.

In re Popkin & Stern, 259 B.R. 701 (B.A.P. 8th Cir. 2001)

In this case the court discusses the *Rooker-Feldman* doctrine, concluding that the doctrine did not prevent the bankruptcy court from determining how to apportion proceeds of a state writ of execution.

LETTERS OF CREDIT

In re Papio Keno Club, Inc., 247 B.R. 453 (B.A.P. 8th Cir. 2000)

Letters of credit are obligations independent of a contract between a debtor and beneficiary and the proceeds of a letter of credit are not property of the bankruptcy estate.

LIEN AVOIDANCE

In re Diegel, 206 B.R. 194, (Bankr. D.N.D. 1997)

Utilizing the definition of "impairment" set forth in § 522(f)(2)(A), the court concluded the debtors could avoid a judicial lien against an interest in inherited property because their exemptions exceeded the amount of the lien.

In re Janssen, 213 B.R. 558 (B.A.P. 8th Cir. 1997)

Status of debtors-in-possession, pursuant to strong-arm provision, as "hypothetical bona fide purchasers" did not make them "purchasers" not bound by IRS tax lien.

In re Mahendra, 131 F.3d 750 (8th Cir. 1997)

Unearned portions of attorneys retainer constitute property of the estate and any pre-petition lien for services terminated by filing of the petition.

In re Johnson, 230 B.R. 608 (B.A.P. 8th Cir. 1999)

Using the LaFond test (In re LaFond, 791 F.2d 623 (8th Cir. 1986)), the court concludes the debtor is not entitled to a "tool of the trade" exemption because he was not currently engaged in farming and had no realistic prospects of returning to farming.

LIENS

In re Wegner, 210 B.R. 799 (Bankr. D.N.D. 1997)

Chapter 7 trustee, as hypothetical bona fide purchaser, could avoid unrecorded first mortgage against debtors' homestead and, under lien preservation provision, succeed to mortgagee's interest.

In re Calvert, 227 B.R. 153 (B.A.P. 8th Cir. 1998)

Reversing the lower court, the B.A.P. held that while perfection of a security agreement in a motor vehicle is accomplished by notation of the lien on the certificate of title, the act of notation is not itself a security agreement but only raises the rebuttable presumption that such agreement exists. There must be evidence of the security agreement independent of the notation of lien.

In re Payless Cashways, Inc., 230 B.R. 120 (B.A.P. 8th Cir. 1999)

In this case the court discusses the mechanics lien requirements of four states including Minnesota and concludes that parties may not by contract alter statutory requirements. The case concerned the theory of "continuing contract."

In re Bernstein, 230 B.R. 144 (Bankr. D.N.D. 1999)

The intent of North Dakota's agricultural lien statute (N.D. Cent. Code § 35-31-01) is to afford a broad lien to anyone providing goods and services used in the production of crops or livestock. However, an owner of livestock may not claim a supplier's lien for himself. Moreover, the lien statement requirements of N.D. Cent. Code § 35-31-02 will be strictly construed.

In re Ferren, 203 F.3d 559 (8th Cir. 2000)

Affirming the BAP *(In re Ferren* 227 B.R. 279), the Circuit holds that federal court is bound by state court determination that judicial liens had not been discharged during bankruptcy proceedings. Rooker-Feldman doctrine prevents bankruptcy court reviewing state court decisions.

LIEN PRIORITY

In re Exec Tech Partners, 107 F.3d 677 (8th Cir. 1997)

Deed of trust holder's priority over general contractor's mechanics' lien was waived by its extensive involvement in construction project.

In re Pagnac, 228 B.R. 219 (B.A.P. 8th Cir. 1998)

Following the Circuit decision of *In re Waugh*, 109 F.3d 489 (8th Cir. 1997), the BAP held that section 108(c) operates to suspend the three year priority period of section 507(a)(8)(A)(i) so long as such period has not expired prior to date of petition filing.

LIMITATION OF ACTIONS

Husmann v. TransWorld Airlines, Inc., 169 F.3d 1151 (8th Cir. 1999)

Warsaw Convention's two-year statute of limitations period for claims brought against airlines was not tolled during time that airline was operating under protection of Bankruptcy Code, notwithstanding law of forum state providing for tolling during stay of suit by injunction.

In re Bodenstein, 253 B.R. 46 (B.A.P. 8th Cir. 2000)

Section 546(a) sets out the time period during which a recovery action may be commenced by trustee. This time may be equitably tolled in cases of extraordinary circumstances beyond the trusee's control.

MORTGAGES

In re Bestrom, 114 F.3d 741 (8th Cir. 1997)

Chapter 7 debtor could not rescind mortgage under TILA based on mortgagee's failure to provide him with notice of right to rescind within three days of consummation of transaction. A court order is unnecessary for registration of title following foreclosure because title fully vests upon expiration of the statutory redemption period.

In re Wegner, 210 B.R. 799 (Bankr. D.N.D. 1997)

Chapter 7 trustee, as hypothetical bona fide purchaser, could avoid unrecorded first mortgage against debtors' homestead and, under lien preservation provision, succeed to mortgagee's interest.

In re Wagner, 259 B.R. 694 (B.A.P. 8th Cir. 2001)

Mortgaged land qualifying as agricultural land requires specific written disclosures if the mortgage contains a homestead waiver clause. Otherwise, under the laws of Iowa, as well as North Dakota, the mortgage will be unenforceable.

PENSIONS

In re Craig, 204 B.R. 750 (D.N.D. 1996)
In re Craig, 204 B.R. 756 (D.N.D. 1997)

Following Patterson, if an ERISA qualified plan contains an enforceable antialienation provision, it is excluded from estate, irrespective of whether it is IRC approved. A plan is subject to ERISA solely on the basis of the type of benefits provided, adopting In re Hanes, 162 B.R. 733 (Bankr. E.D. Va. 1994).

PLEADING

In re Bozeman, 226 B.R. 627 (B.A.P. 8th Cir. 1998)

Untimely amended dischargeability complaints did not relate back to timely pleadings.

In re Montgomery, 236 B.R. 914 (Bankr. D.N.D. 1999)

In this case the court recounts the elements essential to pleading and prosecuting a RICO claim under the federal as well as North Dakota enactments. The predicate acts must be pled by detailed description.

In re Reid, 197 F.3d 318 (8th Cir. 1999)

Reversing the appellate panel (233 B.R. 574), the circuit concludes that a pro se complaint should be dismissed where the plaintiff failed to amend her complaint as ordered by the court.

PREFERENCES

Bruening v. Fulkerson, 113 F.3d 838 (8th Cir. 1997)

Nondebtor corporation's prepetition payment of $13,700 to creditor, for purchase of cattle by corporation's debtor-owner, was not avoidable preference because the payment was made by a co-obligor and would not have an effect on the estate.

Fidelity Financial Services v. Fink, 118 S. Ct. 651 (1998)

Affirming the bankruptcy court (183 B.R. 857) and the Court of Appeals (102 F.3 334), the Supreme Court holds that "perfection" under § 547(e)(1)(B) occurs only

when the secured party has done all the acts required to perfect its interest, state relation back provisions not withstanding. Thus, a creditor may invoke the enabling loan exception of § 547(c)(3) only by perfecting its security interest within 20 days after possession by the debtor.

In re Gateway Pacific Corp., 214 B.R. 870 (B.A.P. 8th Cir. 1998)

Recognizing that there is no precise legal test to apply in determining whether payments are made in the ordinary course of business, the court relying upon Lovett v. St. Johnsbury Trucking, 931 F.2d 494 (8th Cir. 1991) held that the focus must be on the time the debtor ordinarily paid invoices and whether payments within the 90 days reflect some consistency. A significant change in payment patterns takes then outside of the ordinary course of business exception.
The court also discussed the contemporaneous exchange for value exception, reiterating that the inquiry is intent of the parties.

In re Jones Truck Lines, Inc., 130 F.3d 323 (8th Cir. 1997)

Interpreting the § 547 (c)(1) "new value" exception to preferential transfers, the court said that while forbearance from terminating pension fund benefits is usually not new value, the continued services provided by employees who stayed on the job because past-due contributions were made does constitute "new value." The court held that the "new value" contemplated by § 547(1) may be provided to the debtor by a third party, in this case its covered employees.

In re Merrifield, 214 B.R. 362 (B.A.P. 8th Cir. 1997)

Except for a narrow exception created by § 522(h), a Chapter 13 debtor, unlike Chapter 11 and Chapter 12 debtors, does not have the authority to exercise the trustee's avoidance powers.

In re Heitkamp, 137 F.3d 1087 (8th. Cir. 1998)

No preferential transfer occurs when requirements of "earmarking doctrine" are satisfied. The requirements are met when a new lender and debtor agree to use loaned funds to pay pre-existing debts--here subcontracotrs. The bank stepped into the shoes of the old creditor.

In re Wade, 219 B.R. 815 (B.A.P. 8th Cir. 1998)

In this case the Court recounts the elements necessary to prove a preference and

holds that a garnishment of wages earned within the 90 day preference period is an avoidable transfer, as contrasted to a garnishment of wages earned outside the 90 day period.

In re Spirit Holding Co., Inc., 153 F.3d 902 (8th Cir. 1998)

Recalling the "ordinary course of business" exception to the trustee's avoidance power, the court says there is no precise test for determining whether payments were made in the ordinary course of business and courts must engage in a factual analysis. Often proof of an unusual collection effort points to something out of the ordinary but this is not the whole inquiry. Also important is whether a different method of payment represents a significant deviation from past practices.

In re Gateway Pacific Corp., 153 F.3d 915 (8th Cir. 1998)(affirming B.A.P. opinion 214 B.R. 870)

The factual analysis of transactions occuring during the 90 day preference period focuses upon the time debtor ordinarily made payment and whether the payments within the 90 day period reflects some consistancy with that practice. Where late payments were the usual course of dealing they are "ordinary course" but where a significant change in the payment pattern occurs then payments are outside the ordinary course. Citing Lovett v. St. Johnsbury Trucking, 931 F.2d 494 (8th Cir. 1991).

In re Ward, 230 B.R. 115 (B.A.P. 8th Cir 1999)

Following the earmarking rule of In re Heitkamp, 137 F.3d 1087, (8th Cir. 1998), the BAP concludes that granting a security interest to a new lender pursuant to a refinancing agreement did not constitute a transfer of the debtor's property as required for preference avoidance.

In re Dorholt, Inc., 239 B.R. 521 (B.A.P. 8th Cir. 1999) aff'd 224 F3d 871 (8th Cir. 2000)

Recalling the test for "contemporaneous exchange for new value," the court concludes under § 547(c)(1), that perfection of a security interest 16 days after the loan transaction was a substantially contemporaneous exchange. "Substantially contemporaneous" is a flexible concept allowing for case-by-case analysis.

In re Libby Intern., Inc., 247 B.R. 463 (B.A.P. 8th Cir. 2000)

In this case the court discusses the elements essential to a preference and explains

the "earmarking" exception and its elements in the wake of In re Heitkamp, 137 F.3d 1087 (8th Cir. 1998). The ultimate test is whether particular payments diminished the estate or whether, as a whole, one creditor was merely substituted for another. In the 8th Circuit the focus is upon the effect of the transaction.

In re Dornholt, 224 F.3d 871 (8th Cir. 2000)

Affirming the B.A.P. (239 B.R. 521), the Circuit holds that the concept of "substantially contemporaneous" in § 547(c)(1)(A) is not a bright-line ten-day period. Rather, it requires a case-by-case inquiry into all relevant circumstances.

In re James, 257 B.R. 673 (B.A.P. 8th Cir. 2001)

Defining the term "transfer" in connection with wage garnishments, the BAP determined that a transfer of the debtor's interest in wages occurs when the wages are actually earned. Thus, while there may be an existing garnishment lien, it does not attach until the wages are earned.

PREFERENTIAL TRANSFER

In re Arzt, 252 B.R. 138 (B.A.P. 8th Cir. 2000)

Adhering to the decision in *In re Wagner*, 210 B.R. 794, aff'd 162 F.3d 1166, the court held that a debtor cannot exempt property recovered by the trustee as a voidable preferencce where the transfer was voluntary. Pursuant to section 522(g)(1)(A) and 551, the recovered property is preserved for the estate.

In re Bodenstein, 253 B.R. 46 (B.A.P. 8th Cir. 2000)

Section 546(a) sets out the time period during which a recovery action may be commenced by trustee. This time may be equitably tolled in cases of extraordinary circumstances beyond the trusee's control.

PROCEDURE

In re Popkin & Stern, 105 F.3d 1248 (8th Cir. 1997)

Statute governing bankruptcy appeals did not grant Appellate Court jurisdiction to hear appeal from district court's dismissal of interlocutory appeal from bankruptcy court order that denied motion for jury trial. The court cautioned litigants to examine jurisdictional basis for appeal before appealing.

Taylor v. U.S., 106 F.3d 833 (8th Cir. 1997)

The tax court is constitutional and district court did not abuse its discretion in deciding to abstain in favor of tax court determination of tax liabilities.

In re Food Barn Stores, Inc., 107 F.3d 558 (8th Cir. 1997)

Bankruptcy court did not abuse its discretion by entertaining rival bids at hearing on motion for approval of assignment of Chapter 11 debtor's real property lease.

Arleaux v. Arleaux, 210 B.R. 148 (B.A.P. 8th Cir. 1997)

Chapter 7 debtor, whose nondischargeability claim lacked merit because it involved postpetition, postdischarge debt, was not entitled to reopen case to file nondischargeability complaint.

In re Ceresota Mill Ltd. Partnership, 211 B.R. 315 (B.A.P. 8th Cir. 1997)

An objection to attorney fees is subject to Rule 6006(b) and in seeking an enlargement of time, objector must show their neglect and that of counsel was excusable.

In re Webb, 212 B.R. 320 (B.A.P. 8th Cir. 1997)

Pro se litigants are not excused from complying with the law and the court is under no duty to conduct the litigant's discovery or aid in trial preparation.

In re Prasil, 215 B.R. 582 (B.A.P. 8th Cir. 1998)

The failure to obtain a stay pending appeal of an order approving the sale of estate property renders the appeal moot under §363(m). Once a sale has occurred effective relief cannot be granted.

In re Inman, 218 B.R. 458 (B.A.P. 8th Cir. 1998)

In forma pauperis status is unavailable if the trial court certifies that the appeal is not taken in good faith. In the face of such a finding, it is for the applicant to demonstrate objective good faith in the appeal.

In re Yukon Energy Corp., 138 F.3d 1254 (8th Cir. 1998)

Finality for bankruptcy purposes is a complex subject but generally, a more liberal standard is applied due to the peculiar needs of the bankruptcy process.

In re McGowan, 226 B.R. 13 (B.A.P. 8th Cir. 1998)

Local rule was not inconsistent with federal rule imposing 30-day limit for exemption objections.

In re Yukon Energy Corp., 227 B.R. 150 (B.A.P. 8th Cir. 1998)

A Rule 60(b) motion may not serve as a substitute for a timely appeal and where a party fails to timely appeal an adverse judgment, it cannot present appealable issues through a Rule 60(b) motion.

In re Arleaux, 229 B.R. 182 (B.A.P. 8th Cir. 1999)

When a court decides upon a "rule of law," that decision continues to govern the same issues at subsequent stages in the same case.

In re Wintz Companies, 230 B.R. 840 (B.A.P. 8th Cir. 1999)

In absence of a stay pending appeal, Section 363(m) protects purchasers from the effect of reversal or modification on appeal of orders authorizing the sale of property.

In re Danzig, 233 B.R. 85 (B.A.P. 8th Cir. 1999)

Creditors' petition for writ of scire facias to revive judgment against debtor was time-barred.

In re Henry, 238 B.R. 472 (Bankr. D.N.D. 1999)

Granting a motion for default judgment is discretionary and may be influenced by the merits of the movant's substantive claim.

In re Interco, Inc., 186 F.3d 1032 (8th Cir. 1999)

The failure to file a timely claim on a rejected executory contract was not excused under § 9006(b)(1)(2) as the creditor had 4 weeks notice.

In re Russ, 187 F.3d 978 (8th Cir. 1999)

Rule 11 sanctions are available for filing a fraudulent petition and schedules. Imposition, however, is discretionary with the court.

In re Reid, 197 F.3d 318 (8th Cir. 1999)

Reversing the appellate panel (233 B.R. 574), the circuit concludes that a pro se complaint should be dismissed where the plaintiff failed to amend her complaint as ordered by the court.

In re Broady, 247 B.R. 470 (B.A.P. 8th Cir. 2000)

Venue, for purposes of case commencement, may be premised upon any of four alternatives - the debtor's district of residence, domicile, place of business or location of principal assets.

In re Washington, 248 B.R. 565 (B.A.P. 8th Cir. 2000)

Facts alleged in a complaint are deemed admitted where the defendant fails to answer and, if the allegations make out a claim for nondischarge, it is appropriate for default judgment to be entered.

In re Wintz Companies, 219 F.3d 807 (8th Cir. 2000)

Section 363(m) is a rule of finality preventing the overturning of a completed sale to a bona fide purchaser in the absence of a stay. Affirming the B.A.P. (230 B.R. 840 (B.A.P. 8th Cir. 1999)), the circuit held that bankruptcy courts have wide discretion in structuring asset sales and bidding should be reopened only where there is a grossly inadequate price or fraud in the proceedings.

PROCESS

In re Waugh, 109 F.3d 489 (8th Cir. 1997)

11 U.S.C. § 108(c) and 26 U.S.C. 6503(b) and (h) operate to suspend the three-year priority period for unpaid taxes during the pendency of debtors' prior bankruptcy proceedings.

In re Hairopoulos, 118 F.3d 1240 (8th Cir. 1997)

A claim is not "provided for" in a plan if an omitted creditor has not received

notice. Notice under § 342(a) and Rule 2002 means appropriate notice with the burden of proof resting on the debtor.

PROOF OF CLAIM

Raleigh v. Illinois Dept. of Revenue, __ U.S. __, 2000 WL 684179 (2000)

In tax claims the burden of proof is an essential element of the claim itself. As regards tax claims in bankruptcy, the ultimate burden of proof remains with the tax payer if that is where the relevant tax code put it, regardless of the intervention of bankruptcy and despite Bankruptcy Rule 3001(f) which shifts the ultimate risk of nonpersuasion to the claimant. (This decision appears to reverse *In re Brown*, 82 F.3d 801 (8th Cir. 1996).

In re Waterman, 248 B.R. 567 (B.A.P. 8th Cir. 2000)

A properly filed proof of claim creates a prima facie presumption of validity that places the burden of rebuttal upon the debtor. *Compare*: Raleigh v. Illinois Dept. of Rev., 2000 WL 684179 (2000).

PROPERTY OF ESTATE

In re Craig, 204 B.R. 750 (D.N.D. 1996)
In re Craig, 204 B.R. 756 (D.N.D. 1997)

Following Patterson, if an ERISA qualified plan contains an enforceable antialienation provision, it is excluded from estate, irrespective of whether it is IRC approved. (The 5th Circuit in In re Sewell 1999 WL, held that tax qualifications is irrelevant to the tax issue.) 486630 (5th Cir. 1999). A plan is subject to ERISA solely on the basis of the type of benefits provided, adopting In re Hanes, 162 B.R. 733 (Bankr. E.D. Va. 1994).

Eilbert v. Pelican, 212 B.R. 954 (B.A.P. 8th Cir. 1997)

Citing Iowa law, the court held that the statute affording an exemption for annuities is designed to protect payments received as wage substitutes after retirement and does not shield lump-sum investments purchased by the debtor over which she maintains control. The court relied upon Huebner, 986 F.2d 1222 (8th Cir. 1993).

In re Van Der Heide, 219 B.R. 830 (B.A.P. 8th Cir. 1998), rev'd, 164 F.3d 1183 (1999).

Section 541 is broad enough to include both the debtor's interest and his non-

debtor wife's interest in property held by the entirety even though such interests are incapable of partition. Joint creditors may reach the non-debtor spouse's interest in tenancy by the entireties property.

In re Craig, 144 F.3d 593 (8th Cir. 1998)

A debtor's right to setoff is property of the estate.

In re Miller, 224 B.R. 913 (Bankr. D.N.D. 1998)

ERISA-qualified plans are not property of the bankruptcy estate and are thus, at case inception, excluded from that property from which exemptions may be claimed.

In re Potter, 228 B.R. 422 (B.A.P. 8th Cir. 1999)

In the absence of a valid spendthrift provision, every right a debtor has under a trust including a subsequent appreciation in value, becomes property of the estate. If an asset is property of the estate, the estate's interest is in the entire asset including any post-petition changes in value.

In re Van Der Heide, 164 F.3d 1183 (8th Cir. 1999)

Here the Circuit reverses the B.A.P. (219 B.R. 830) which, based upon *Garner*, held that entireties property becomes property of the estate if only one spouse files bankruptcy. In its decision, the Circuit explains its holding in *In re Garner*, 952 F.2d 232 (8th Cir. 1991), saying that property interests are created by state law and application of *Garner* to a hypothetical sale of entireties property that is not subject to partition would lead to an impermissible result.

In re Simmonds, 240 B.R. 897 (B.A.P. 8th Cir. 1999)

Applying Minnesota law, the court concludes that self-settled trusts, where the settlor is also the beneficiary, do not qualify as spendthrift trusts and therefore are not excluded from the bankruptcy estate pursuant to § 541(c)(2). See also *Drewes v. Schonteich* 31 F.3d 674 (8th Cir. 1994).

In re Lesmeister, 242 B.R. 920 (Bankr. D.N.D. 1999)

The bankruptcy estate includes any asset of value both tangible and intangible. The notion of proceeds is broader than the U.C.C. definition and includes crop

loss disaster payments. If the debtor's interest in property is sufficient to render it estate property then it is sufficient as well for attachment.

In re Schauer, 246 B.R. 384 (Bankr. D.N.D. 2000)

The estate includes property acquired within 180 days of filing through bequest, devise or inheritance. Thus property distributions from a testamentary trust are included but distributions from an inter-vivos trust are not included as they are not "bequests," "devises," or "inheritances."

U.S. v. Novak, 217 F.3d 566 (8th Cir. 2000)

In this case involving criminal bankruptcy fraud, the court stated that a debtor must disclose all property interests even though its status may be uncertain and even if it is later determined not to be property of the estate. The failure to do so is a fraud upon the court.

In re Jeter, 257 B.R. 907 (B.A.P. 8th Cir. 2000)

Alimony payments received during the 180-day post-petition period are not property of the estate under § 541(a)(5)(B) which, on its face, does not include alimony awards.

REAFFIRMATION

Greenwood Trust Co. v. Smith, 212 B.R. 599 (B.A.P. 8th Cir. 1997)

Proposing a reaffirmation agreement is an attempt to collect a debt and is violative of Iowa Law. The Bankruptcy Code's reaffirmation provisions, § 524(c)(3) and (c)(6), did not preempt Iowa law prohibiting creditors from communicating directly with debtors.

In re Hurley, 215 B.R. 391 (B.A.P. 8th Cir. 1997)

Credit card company did not violate Iowa Code of Professional Responsibility by sending copy of reaffirmation proposal directly to debtors who were represented by counsel.

Sears, Roebuck & Co. v. O'Brien, 178 F.3d 962 (8th Cir. 1999)

Iowa law proscribing certain collection efforts is not preempted by federal bankruptcy law. Here circuit follows Greenwood Trust Co. v. Smith, 212 B.R.

599 (B.A.P. 8th Cir. 1997).

RES JUDICATA

In re Anderson-Lund Printing Co., 109 F.3d 1343 (8th Cir. 1997)

Res judicata may take several forms--claim preclusion and issue preclusion. The principles of res judicata generally apply in bankruptcy proceedings. Where claim for administrative expenses was litigated in context of an adversary proceeding, claimant was barred from thereafter moving for administrative expenses based upon same facts.

RESTITUTION

In re Wilson, 252 B.R. 739 (B.A.P. 8th Cir. 2000)

Here the court discusses section 1328(a)(3) concluding that the term "conviction" as used in the section includes a plea of guilty followed by a sentence of probation, despite the absence of the formal entry of conviction. Thus, any restitution obligation arising in connection with a probation constitutes a debt for restitution and is excepted from discharge in Chapter 13.

RICO

In re Montgomery, 236 B.R. 914 (Bankr. D.N.D. 1999)

In this case the court recounts the elements essential to pleading and prosecuting a RICO claim under the federal as well as North Dakota enactments. The predicate acts must be pled by detailed description.

SALES

In re Prasil, 215 B.R. 582 (B.A.P. 8th Cir. 1998)

The failure to obtain a stay pending appeal of an order approving the sale of estate property renders the appeal moot under §363(m). Once a sale has occurred effective relief cannot be granted.

In re Wintz Companies, 219 F.3d 807 (8th Cir. 2000)

Section 363(m) is a rule of finality preventing the overturning of a completed sale to a bona fide purchaser in the absence of a stay. Affirming the B.A.P. (230 B.R. 840 (B.A.P. 8th Cir. 1999)), the circuit held that bankruptcy courts have wide

discretion in structuring asset sales and bidding should be reopened only where there is a grossly inadequate price or fraud in the proceedings.

SANCTIONS

In re DeLaughter, 213 B.R. 839 (B.A.P. 8th Cir. 1997)

Rule 11 sanctions were appropriate where, following multiple Chapter 13 plan proposals, a renewed plan legally unsupportable, had been filed solely for the purpose of delaying a state court action.

In re Russ, 187 F.3d 978 (8th Cir. 1999)

Rule 11 sanctions are available for filing a fraudulent petition and schedules. Imposition, however, is discretionary with the court.

SECURITY INTEREST

Kunkel v. Sprague Nat. Bank, 128 F.3 636 (8th Cir. 1997)

A person with less interest than outright ownership may have sufficient rights in collateral for a security interest to attach. An agreement to purchase may give rise to sufficient rights. This case also reviews the elements necessary for a purchase money security interest to attain super priority status under § 9-312(3) of the U.C.C.

In re Calvert, 227 B.R. 153 (B.A.P. 8th Cir. 1998)

Reversing the lower court, the B.A.P. held that while perfection of a security agreement in a motor vehicle is accomplished by notation of the lien on the certificate of title, the act of notation is not itself a security agreement but only raises the rebuttable presumption that such agreement exists. There must be evidence of the security agreement independent of the notation of lien.

In re Cantu, 238 B.R. 796 (B.A.P. 8th Cir. 1999)

The definition of "security agreement" is flexible and may be inclusive of several documents which, when read together, become integrated and which may be taken together to satisfy the requirements of the Uniform Commercial Code.

In re Dorholt, Inc., 239 B.R. 521 (B.A.P. 8th Cir. 1999)

Recalling the test for "contemporaneous exchange for new value," the court concludes under § 547(c)(1), that perfection of a security interest 16 days after the loan transaction was a substantially contemporaneous exchange. "Substantially contemporaneous" is a flexible concept allowing for case-by-case analysis.

In re Lesmeister, 242 B.R. 930 (Bankr. D.N.D. 1999)

In this case the court discusses security interests and attachment in the context of government disaster payments, concluding that the debtor had "rights to payment" under state law when the events occur giving rise to a claim.

SETOFF

In re Sauer, 223 B.R. 715 (Bankr. D.N.D. 1998)

FSA has the right of seetoff against the debtors' anticipated CRP and PFC payments.

In re Alvstad, 223 B.R. 733 (Bankr. D.N.D. 1999)

In this case the court discusses the right of setoff under § 553(a) in the context of Rural Housing Service's ability to setoff against CRP Payments.

SETTLEMENTS

In re Martin, 217 B.R. 316 (B.A.P. 8th Cir. 1997)

Approval of a settlement or compromise does not turn upon whether it is the best result obtainable. Rather, the test is whether the settlement is fair and equitable and in the best interests of the estate.

In re T.G. Morgan, Inc., 172 F.3d 607 (8th Cir. 1999)

Trustee was judicially estopped from asserting claim against law firm for funds disbursed according to settlement.

STATUTES

In re Heaper, 214 B.R. 576 (B.A.P. 8th Cir. 1997)

Declining to give retroactive effect to Missouri's Uniform Fraudulent Transfer Act, the panel analyzed and discussed when retroactive application of a statute is

appropriate.

In re Old Fashioned Enterprises, Inc. 236 F.3d 422 (8th Cir. 2001)

In this case the court discusses interpretation of statutes and relationship to agency regulations.

STAY

In re Just Brakes Corporate Systems, Inc., 108 F.3d 881 (8th Cir. 1997)

Judgment creditors violated automatic stay by collecting proceeds from sale of Chapter 7 debtor-corporation's registered trademark, which was sold to satisfy prepetition judgment.

In re Just Brakes Corporate Systems, Inc., 108 F.3d 881 (8th Cir. 1997)

Damages under § 362(h) is the only remedy available for a violation of the automatic stay. However, damages for willful violation of the stay under § 362(h) only applies to "individual" as opposed to "corporate" debtors.

Riley v. U.S., 118 F.3d 1220 (8th Cir. 1997)

An IRS assessment resulting in a notice of proposed assessment made subsequent to bankruptcy filing is subject to the automatic stay.

In re Wald, 211 B.R. 359 (Bankr. D.N.D. 1997)

Debtors' unrealistic projections coupled with failed prior Chapter 12 cases including one in which they stipulated to relief from stay in the event of default demonstrated bad faith and constituted cause for relief from stay. Absent special circumstances it is bad faith for a debtor to refile as a means of avoiding the effects of a stipulation for relief from stay upon plan default.

Sav-A-Trip, Inc. v. Belfort, 164 F.3d 1137 (8th Cir. 1999)

Extension of the automatic stay to a debtor's co-defendants in a civil proceeding is proper only in unusual circumstances. (citing *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 676 (8th Cir. 1992)).

In re Blan, 237 B.R. 737 (B.A.P. 8th Cir. 1999)

In this case the court reviews the factors appropriate for determining whether to grant relief from stay, concluding relief was appropriate to allow litigation involving the debtor to continue in state court.

In re Bowman, 253 B.R. 233 (B.A.P. 8th Cir. 2000)

In this case the court reviews the standards for relief from stay under 362(d)(2), particularly discussing reorganizational prospects where, over a seven month period the debtors proposed a plan premised upon unrealistic farming ideas.

In re James, 257 B.R. 673 (B.A.P. 8th Cir. 2001)

Contempt is not an appropriate remedy for violation of the automatic stay. Section 362(h), providing for actual damages and costs, is the appropriate remedy.

In re Vargason, 260 B.R. 488 (Bankr. D.N.D. 2001)

Although the automatic stay prevents a creditor from taking any action to collect a debt, it does not prevent a non-debtor spouse from seeking to modify a divorce decree or commence an action for alimony or the collection of alimony from non-estate property. See In re Kopp, 622 N.W.2d 726 (N.D. 2000) for post-discharge divorce proceedings.

STIPULATIONS

In re Heine Feedlot Co., 107 F.3d 622 (8th Cir. 1997)

Parol evidence rule precluded Chapter 11 debtor from explaining, on motion to compel interest and legal fee adjustments, what parties meant by variable "A" interest rate imposed by plan, given unambiguous language in plan and in parties' subsequent stipulation.

In re Wald, 211 B.R. 359 (Bankr. D.N.D. 1997)

A showing of special circumstances is necessary to relieve a debtor from a stipulation for the lifting of stay upon default.

STUDENT LOAN

In re Johnson, 218 B.R. 449 (B.A.P. 8th Cir. 1998)

Adopting a broad definition of the word "loan," the court holds that an extension

of credit for tuition, books & expenses is a loan for purposes of section 523(a)(8) despite the fact that no money changed hands.

In re Scott, 147 F.3d 788 (8th Cir. 1998)

Although the note provided for payments to commence at the conclusion of a 6 month grace period commencing when the borrower left school, the court, reversing the bankruptcy court, holds that for dischargeability purposes, the note 'first became due' on the date the first installment was to be made according to a payment schedule unilaterally established by the lender after expiration of the grace period. Here the lender had a contractual right to unilaterally establish a repayment schedule.

In re Andersen, 232 B.R. 127 (B.A.P. 8th Cir. 1999)

The Appellate Panel concludes that there is no statutory authority, in making an undue hardship determination, to grant a partial discharge. Section 523(a)(8) is clear and unambiguous. However, it should be applied to each loan separately. The court also reviewed the various "undue hardship" tests concluding that the best measure is the "totality of the circumstances" in a particular case, citing *In re Andrews*, 661 F.2d 702 (8th Cir. 1981).

In re Cline, 248 B.R. 347 (B.A.P. 8th Cir. 2000)

Relying upon the totality of the circumstances with emphasis on current and future financial resources, court affirms the lower court's conclusion that a highly educated person with no dependents should be relieved of her student loan obligations. The court could found no clear error.

In re Randall, 255 B.R. 570 (Bankr. D.N.D. 2000)

In a fact specific case, the Court found that a graduate attorney complaining of chronic pain syndrome was not under an "undue hardship" despite marginal employment.

In re McCormick, 259 B.R. 907 (B.A.P. 8th Cir. 2001)

A debtor seeking to discharge student loans has the burden, both in terms of evidence and of persuasion, of proving undue hardship by a preponderance of the evidence.

SUBSTANTIAL ABUSE

In re Koch, 109 F.3d 1285 (8th Cir. 1997)

> The "substantial abuse" inquiry focuses primarily upon the debtor's ability to pay creditors and this ability is measured by evaluating the debtor's financial condition. Revenue received from exempt sources are included in the calculation and becomes disposable income to the extent not needed for support.

In re Nelson, 223 B.R. 349 (B.A.P. 8th Cir. 1998)

> Granting Chapter 7 relief to debtor who had ability to fund Chapter 13 plan and to repay 79.9% of her unsecured debt would be a substantial abuse.

In re Taylor, 212 F.3d 395 (8th Cir. 2000)

> For purposes of dismissal for substantial abuse under section 707(b), it is appropriate to include ERISA pension income in the disposable income calculation. Citing *Koch*, 109 F.3d 1285 (8th Cir. 1997), the court said the fact that pension income may be exempt is irrelevant to the question of whether it is reasonably necessary for support.

TAXES

Taylor v. U.S., 106 F.3d 833 (8th Cir. 1997)

> IRS disclosure of federal tax information to state taxing authority was an exception to Privacy Act.

Taylor v. U.S., 106 F.3d 833 (8th Cir. 1997)

> The tax court is constitutional and district court did not abuse its discretion in deciding to abstain in favor of tax court determination of tax liabilities.

In re Waugh, 109 F.3d 489 (8th Cir. 1997)

> 11 U.S.C. § 810(c) and 26 U.S.C. 6503(b) and (h) operate to suspend the three-year priority period for unpaid taxes during the pendency of debtors' prior bankruptcy proceedings.

Riley v. U.S., 118 F.3d 1220 (8th Cir. 1997)

An IRS assessment, resulting in a notice of proposed assessment made subsequent to bankruptcy filing, is subject to the automatic stay.

In re Mosbrucker, 220 B.R. 656 (Bankr. D.N.D. 1998)

Portions of IRS claim comprised of civil penalties for Chapter 12 debtors' failure to pay trust fund taxes and prepetition interest on debtors' tax liabilities qualified for priority status and were nondischargeable.

In re Mosbrucker, 227 B.R. 434 (B.A.P. 8th Cir. 1998), aff'd 198 F.3d 250 (8th Cir. 1999)

Here the B.A.P., confirming the bankruptcy court, held that trust fund taxes, although labeled as "penalties," are actually in the nature of nondischargeable priority "trust fund taxes." As a priority, the IRS claim was required to be paid in full over the life of the Ch. 12 plan.

U.S. v. Kearns, 177 F.3d 706 (8th Cir. 1999)

Reversing the B.A.P. decision of In re Kearns, 219 B.R. 823 (B.A.P. 1998), the Court sustained the bankruptcy court's determination that a debtor may take an offset against post-petition tax liability arising through a theft-loss deduction and restitution payments.

In re Voightman, 236 B.R. 878 (Bankr. D.N.D. 1999)

Construing §§ 507(a)(8)(E) and 523(a)(1)(A), the court concludes that unpaid workers' compensation premiums are "excise taxes" and nondischargeable.

In re Behr, 238 B.R. 151 (B.A.P. 8th Cir. 1999)

For litigation expenses to be deductible as a trade or business expense, they must arise from the activity of carrying on a business. Litigation expenses incurred in connection with a state child-support dispute are not deductivle even though debtor may have lost business as a result.

In re Voightman, 239 B.R. 380 (B.A.P. 8th Cir. 1999)

Affirming the bankruptcy court (236 B.R. 878), B.A.P. holds that under the Lorber test, unpaid workers compensation taxes were nondischargeable "excise taxes."

In re O'Connell, 246 B.R. 332 (B.A.P. 8th Cir. 2000)

In this case the BAP, following *In re Lewis*, 199 F.3d 249 (5th Cir. 2000), holds that the definition of "assessment" under § 507 as applied to state taxes means that point when the liability is finally determined. A "final determination" is not made until the taxpayer's substantive rights have been exhausted under state law.

Raleigh v. Illinois Dept. of Revenue, __ U.S. __, 2000 WL 684179 (2000)

Resolving a split of authority, the court holds that the burden of proof on a tax claim in bankruptcy remains where the substantive tax law creating the obligation puts it.

TRUSTEE

In re Popkin & Stern, 238 B.R. 146 (B.A.P. 8th Cir. 1999)

A liquidating trustee, in his capacity as holder of a money judgment, steps into the debtor/seller's shoes.

In re Neill, 242 B.R. 685 (Bankr. D.N.D. 1999)

A trustee is bound by § 330(a) just as any other professional and in seeking fees for services must provide a detailed fee application addressing the factors codified in § 330(a)(3).

TRUSTS

In re Montgomery, 236 B.R. 914 (Bankr. D.N.D. 1999)

Section 523(a)(4) as it relates to fiduciary capacity is limited to express or technical trusts and does not reach relationships such as agency, bailment, factors, etc.

In re Simmonds, 240 B.R. 897 (B.A.P. 8th Cir. 1999)

Applying Minnesota law, the court concludes that self-settled trusts, where the settlor is also the beneficiary, do not qualify as spendthrift trusts and therefore are not excluded from the bankruptcy estate pursuant to § 541(c)(2). See also *Drewes v. Schonteich* 31 F.3d 674 (8th Cir. 1994).

In re Schauer, 246 B.R. 384 (Bankr. D.N.D. 2000)

A distribution from a valid spendthrift trust is excluded from the bankruptcy estate and any eventual interest in receiving a distribution of the corpus upon termination is also excluded.

TURNOVER

In re Dean, 107 F.3d 579 (8th Cir. 1997)

Order restraining Chapter 7 debtors' former attorney and legal secretary from disposing of any assets before final disposition of bifurcated turnover trial was not improper prejudgment sequestration of property.

In re Ferren, 227 B.R. 279 (B.A.P. 8th Cir. 1998)

Under *Rooker-Feldman* doctrine, bankruptcy court lacked jurisdiction over debtor's proceeding seeking turnover of funds that state court ordered disbursed to lienholders. aff'd *In re Ferren*, 203 F.3d 559 (8th Cir. 2000)

VALUATION

Associates Commercial Corp. v. Rash, 117 S. Ct. 1879 (1997)

Under § 506(a) the value of property retained by a debtor is its replacement value.

WILLFUL AND MALICIOUS INJURY

In re Geiger, 113 F.3d 848 (8th Cir. 1997)

In a rehearing en banc the circuit held that a judgment debt cannot be excepted from discharge under § 523(a)(6) unless it is based upon an intentional tort--one that is based on the consequences of an act rather than the act itself. Unless the debtor desires to cause the consequences or believe the consequences are substantially certain to result, he has not committed an intentional tort. The dissent suggests this case was crafted as it was to shield medical malpractice judgments from § 523(a)(6). The element of "intent" under the statute does not require proof of a subjective intent to injure as the majority found. In re Long, 774 F.2d 875 (8th Cir. 1985) said that "willful" meant conduct which was headstrong and knowing. The dissent feels the majority is a significant departure from Long.

In re Novotny, 226 B.R. 211 (Bankr. D.N.D. 1998)

Applying the Geiger standard, this court concludes that a wrongful death award as a consequence of debtor shooting and killing his girlfriend was a debt for willful and malicious injury. Here the court concluded that "malice" is conduct without just cause or excuse.

In re Scarborough, 171 F.3d 638 (8th Cir. 1999)

To be nondischargeable under § 523(a)(6) a debtor must have acted with intent to harm the creditor rather than merely acting intentionally in a way that resulted in harm. Moreover, if actual and punitive damages are based on the same conduct, both will be regarded as willful and malicious.

In re Eckroth, 247 B.R. 799 (Bankr. D.N.D. 2000)

Here the court, discussing the intentional torts of malicious prosection and abuse of process, holds that under either theory, for a claim to be nondischargeable under 523(a)(6), the debtor's actions must have been without cause and directed at the claimant with an intent to injure.

In re Fors, 259 B.R. 131 (B.A.P. 8th Cir. 2001)

Recounting the elements for nondischarge under section 523(a)(6), the BAP concludes that a chiropractor's conduct in making a patient sexually submissive was "willful" and "malicious". Malicious intent can be established by circumstancial evidence.